78-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner United States Independent Telephone Association (USITA)[1] respectfully prays that a writ of certiorari be issued to review the opinions and orders of the United States Court of Appeals for the District of Columbia Circuit in this case.

[1] USITA's interest in this case is that of the approximately 1,600 "Independent" (non-Bell) telephone companies of these United States, which serve about 30 million telephones in over half of the served geographical area of the nation; and which, together with Bell System companies, have constructed and operate the integrated nationwide telephone network.

OPINIONS BELOW

The opinions of the Court of Appeals in this case, all captioned *MCI Telecommunications Corp.* v. *F.C.C.*, are:

1. July 28, 1977, reported at 561 F.2d 365 (herein *"Execunet I"*); *cert. den.*, 46 U.S.L.W. 3446, —— U.S. —— (Jan. 16, 1978);
2. April 14, 1978, not yet officially reported (herein *"Execunet II"*);
3. May 8, 1978, not yet officially reported (herein *"Execunet III"*).

These three opinions appear as Appendix I, Appendix D, and Appendix E, respectively, in the separately bound appendix to the petition in this case filed this date by American Telephone and Telegraph Company.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1978, and petitions for rehearing and suggestions for rehearing *en banc* were denied on May 8, 1978. Timely motions for stay pending certiorari were denied by the Court of Appeals on May 11, 1978;[3] and applications for stay were denied by the Court on May 22, 1978.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[2] To avoid burdening the court with unnecessarily duplicative material, USITA will adopt the A. T. & T. Appendix and refer to it herein as "Pet. App."

[3] The lower court did grant stay pending filing and disposition of application for stay to the Circuit Justice.

QUESTION PRESENTED

Whether the court below has once more overstepped the bounds of judicial review and "unjustifiedly [and erroneously] intruded into the administrative process"[4] by judicially ordering (1) continued and expanded competition in the provision of long-distance telephone service and (2) the use of existing telephone company local exchange facilities in furtherance of that competition, all in the absence of the Congressionally mandated public interest findings by the Federal Communications Commission.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended[5] appear as Pet. App. F.

STATEMENT OF THE CASE

In 1971, acting on representations by applicants for authority to offer "specialized" interstate communications services that the services proposed were not available from existing telephone companies, the F.C.C. established a general policy permitting essentially open entry into "the business . . . of providing specialized private or leased line communication services through a microwave transmission facility as distinguished from public exchange and long distance toll telephone service."[6] This distinction and the scope of

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[4] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 46 U.S.L.W. 4301, 4310, —— U.S. —— (April 3, 1978).

[5] 47 U.S.C. 151, *et seq.*

[6] *Washington Utilities & Transportation Com.* v. *F.C.C.*, 513 F.2d 1142, 1155 (9th Cir. 1975); *cert. den.*, 423 U.S. 836 (1975), affirming *Specialized Common Carriers*, 29 FCC 2d 870 (1971), *recon. den.* 31 FCC 2d 1106 (1971).

authorizations granted by F.C.C. pursuant to *Specialized Carriers* were well understood by all concerned, including petitioner below, the original specialized carrier, Microwave Communications, Inc. (MCI). In its "Motion to Strike," filed May 15, 1974 in *Washington Utilities, supra,* MCI argued:

> "Specialized carriers are not authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has ever alleged that they are."

Four months later, in September 1974, MCI filed with the Commission a tariff offering metered use service, a service subsequently advertised and promoted by MCI as "Execunet". The Execunet tariff was twice rejected by the Commission as an unauthorized duplication of ordinary long distance telephone service.[7]

In *Execunet I, supra,* the court below in essence found that although the Commission considered only the services proposed in the application before it, and may have thought it was granting MCI only the authority it sought, *i.e.,* to provide only private line services,[8] the statute under which the Commission has been operating for over 40 years permits limitations on grants only under the "terms and conditions" clause of Section 214(c), and only on an adequately supported affirmative finding that the public interest re-

[7] *MCI Telecommunications Corp.,* 60 FCC 2d 25 (1976) and Appendix B (letter order, 1975).

[8] In the court's words, "We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision" *Execunet I,* 561 F.2d at 378, Pet. App. 25i.

quires limitations.[9] Finding further that the Commission's *Specialized Carrier* decision "cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required 'private line' restrictions," the Court below held that MCI's authorizations were unrestricted.[10] Next addressing the question of the provision by MCI of "Execunet" service, the court's words were:

> ". . . we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings."[11]

Execunet I thus "reversed and remanded," with expressions of concern and words of caution to the Commission that in the court's view FCC had not so far determined that A T & T should be granted a *de jure* monopoly in the long distance telephone field, and therefore should draw no public interest inferences from the fact that another carrier's proposed services would compete in that field.[12]

[9] *Execunet I,* 561 F.2d at 377, Pet. App. 23i. Section 214(c) of the Communications Act (47 U.S.C. 214(c)), which the court thus construed, provides in pertinent part that:

> "The Commission shall have power to issue such certificate [of public convenience and necessity] as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line . . . described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

[10] *Execunet I,* 561 F.2d at 379, Pet. App. 28i.

[11] *Execunet I,* 561 F.2d at 380, Pet. App. 30i.

[12] *Ibid.*

Motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, were granted and petitions for certiorari, duly filed by USITA, AT&T, and FCC, were opposed by MCI and Southern Pacific Communications Company [13] on the ground, *inter alia,* that review by the Court would be premature, since *Execunet I* "made no ruling on the lawfulness of *Execunet* . . . or between authorized and non-authorized services. All these matters are left for the Commission to decide." [14] The Court denied certiorari on January 16, 1978 (Mr. Justice Stewart and Mr. Justice Powell were recorded as voting for grant).

On February 28, 1978 the Commission, responding to an AT&T "Petition for Declaratory Order," held that its earlier interconnection order,[15] under which Bell System companies were required to interconnect their local exchange facilities with the intercity facilities of the specialized carriers, covered only private line services, not long distance telephone service.[16] In reaching its conclusion, the Commission recognized, as indeed did the Court of Appeals in *Execunet I,* the "very different issue" (from facility authorizations) involved in a Communications Act Section 201(a) interconnection proceeding,[17] where interconnection of

[13] The Solicitor General urged granting of the writ, but reserved his position on the merits.

[14] Nos. 77-420 *et al.*, SPCC Brief in Opposition, pp. 10-11.

[15] *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974); *aff'd. sub nom. Bell Telephone Company of Pennsylvania* v. *F.C.C.,* 403 F.2d 1250 (3d Cir. 1974), *cert. den.,* 422 U.S. 1026 (1975); see also *MCI* v. *A.T.&T.,* 496 F.2d 214 (3d Cir. 1974).

[16] Memorandum Opinion and Order, FCC 78-142, Pet. App. C.

[17] *Execunet I,* 561 F.2d at 378, n.59, Pet. App. 24i-25i.

carrier facilities can only be ordered by the Commission after opportunity for hearing and on an affirmative finding that interconnection is necessary or desirable in the public interest.[18] Acknowledging, as the Court of Appeals in *Execunet I* also pointed out, that there had been no hearings on the issue of competition in the long distance telephone field, and finding that there had been neither notice nor opportunity for hearing on the long distance telephone service interconnection issue, the Commission concluded that it was bound by the Third Circuit's affirmance of the Commission's interconnection order, specifically that court's ruling that the order was not overbroad when construed—as the court did—to cover only private line services.[19]

MCI's reaction to this FCC ruling took the form of a motion to the *Execunet I* court "for an order directing compliance with mandate." The motion was granted by the court below on April 14, 1978 (*"Execunet II"*) with the order being accompanied by a 22-page opinion by Chief Judge Wright, in which is recited "the long series of proceedings and litigation in which MCI has attempted to secure and preserve its

[18] At common law there is no duty on the part of a carrier to physically connect its facilities with those of another carrier. *Atchison, Topeka & S.F. R.R. Co.* v. *Denver N.O. R.R. Co.,* 110 U.S. 667 (1884); *Louisville & Nashville R.R. Co.* v. *West Coast Co.,* 198 U.S. 483 (1904). The interconnection obligation is thus purely a matter of statute, and arises only on Commission order.

[19] Memorandum Opinion and Order, FCC 78-142, February 28, 1978, Pet. App. C. Instructive in this context is the Third Circuit's earlier decision in *MCI* v. *AT&T, supra,* n.15, in which the court vacated a district court ordered interconnection because of uncertainty as to what private line services had been authorized by FCC and to accord to the agency the right to first determine the scope of permissible competition between specialized and existing carriers.

authority to offer Execunet service," the "almost continuous resistance from AT&T," and the "thought that this process finally culminated in our *Execunet* decision upholding MCI's authority to offer Execunet pending further rulemaking by the Commission." [20]

Finding that the Commission's order ". . . twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree," [21] the court below found that although *Execunet I* ". . . is not addressed explicitly to the interconnection issue or to A. T .& T.'s obligation to provide interconnection," [22] "the fact of the matter is that our *Execunet* decision *did* clearly contemplate—by virtue of A. T. & T.'s representations and actions—that A. T. & T. was required to provide interconnection for Execunet service." [23]

Petitions for rehearing and suggestions for rehearing *en banc* were denied by the court below on May 8, 1978. USITA's motion for stay pending certiorari was denied on May 11, 1978, with a ten page *per curiam* (*"Execunet III"*) restating the court's view of MCI's authority to provide long distance telephone service as unlimited and unrestricted, its view of telephone companies interconnection obligations necessarily similarly unbounded, and its determination that MCI's right to enter and to expand its participation in the long distance telephone service market must be allowed to

[20] *Execunet II, slip op.*, p. 3; Pet. App. 2a-3a.

[21] *Execunet II, slip op.*, p. 16, Pet. App. 15a.

[22] *Id.* at 11, Pet. App. 10a-11a.

[23] *Id.* at 10, Pet. App. 9a.

continue ". . . until and unless it was found that the public interest demanded otherwise." [24]

REASONS FOR GRANTING THE WRIT

The Commission's response to the *Execunet I* mandate was the institution on February 28, 1978 of a proceeding [25] to determine the precise question posed by the court below in its *Execunet I* opinion, *i.e.*, "whether competition like that posed by Execunet is in the public interest." [26] It is clear, and the court below agrees, that the Commission has not yet affirmatively made that public interest determination.

In *Execunet II* and *Execunet III*, however, the court below (1) has itself authorized that competition, and (2) has itself ordered existing telephone companies to interconnect their local exchange facilities in furtherance of that competition. In so doing, the lower court has now so far overstepped the permissible bounds of judicial review as to warrant summary reversal.

Indeed, in its trio of *Execunet* decisions the court below has seriously misread the statutes involved, has usurped the Commission's authority to determine the public interest in both grants of authority and interconnection matters, and has precluded responsible exercise of that authority by the agency, all in direct conflict with the Commission's statute, the applicable and

[24] *Execunet II, slip op.*, at 15, Pet. App. 14a.

[25] "*In the Matter of MTS and WATS Market Structure*", CC Docket No. 78-72, Notice of Inquiry (FCC 78-144), adopted February 23, 1978.

[26] *Execunet I*, 561 F.2d at 380, Pet. App. 30i.

controlling decisions of the Court and the interconnection decisions of the Third Circuit.

I. The Court Below Has Far Overstepped The Bounds Of Judicial Review.

That the court below may not have had available to it on April 14, 1978 (the date of *Executet II*) the Court's April 3, 1978 opinion in *Vermont Yankee Nuclear Power Corp.* v. *NRDC* (46 U.S.L.W. 4301) does not excuse or justify its flagrant violation of the standard for judicial review of agency action.

Here, as in *Vermont Yankee,* the agency involved has been given broad regulatory authority, in this case over the development of ". . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." [27] Here, as in *Vermont Yankee,* construction permits and licenses (or certificates of convenience and necessity) must be obtained; and grant by the agency must be based on adequate findings that the public interest, convenience and necessity require or will be served by grant of the authority requested.[28] And here, as in *Vermont Yankee,* the decisions below emanate from the Court of Appeals for the District of Columbia Circuit and thus "will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." [29]

Even without *Vermont Yankee,* however, the standard for judicial review has been well established by the Court in a long line of decisions, including *F.C.C.* v.

[27] Communications Act of 1934, Sec. 1 (47 U.S.C. 151).

[28] *Ibid.*, Secs. 214, 308-309.

[29] *Vermont Yankee, supra,* at 4305, n.14.

Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940); *SEC* v. *Chenery,* 332 U.S. 194, 196 (1947); *F.C.C.* v. *Schreiber,* 381 U.S. 279, 290 (1965); *Burlington Truck Lines* v *U.S.,* 371 U.S. 156, 169 (1972); and *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976). It has been and remains absolutely clear that judicial review of agency action must be based on the agency's action and its rationale. Moreover, as the Court held in *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952), the "function of the reviewing court ends when an error of law is laid bare. At that point the matter goes once more to the Commission for reconsideration." Further, As Mr. Justice Rehnquist, reviewing *Transcontinental, supra,* for the Court in *Vermont Yankee* said:

> "In that case, in determining the proper scope of judicial review of agency action under the Natural Gas Act, we held that while a court may have occasion to remand an agency decision because of the adequacy of the record, the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.' " [30]

Measured by these standards, the decisions below are clearly beyond the pale. For in these decisions the *Executet* court first found error in the Commission's failure to affirmatively find a public interest requirement to limit its authorizations to MCI—a finding obviously impossible in view of the total absence of a record relating to services which MCI had not pro-

[30] *Vermont Yankee, supra,* at 4307.

posed. Had the court below stopped at that point, its decision could have arguably been said to have complied with the judicial review standard, even if its construction of the Commission's statute were erroneous.

But the court below did not stop with laying bare what it viewed as the Commission's error of law. Rather, it gratuitously counselled the Commission in *Execunet I* that it must develop a new record, a record on which a finding could be made that grant of authority for services for which authority was not sought could be found to be not in the public interest. Additionally, the court advised the FCC that no public interest inferences should be drawn from the fact that a proposed service would compete in the long distance telephone field; and that the Commission "must be ever mindful that just as it is not free to create competition for competition's sake,[30] it is not free to propagate monopoly for monopoly's sake;" and that the test is the public interest, "not the private financial interests of those who until now have enjoyed the fruits of *de facto* monopoly." [31]

In *Execunet II,* the court below went still farther afield. It decided there that not only had the Commission erred, but that its failure (in the court's view) to adequately and properly limit MCI to the provision of private line services in fact not only *authorized* MCI to operate its facilities to provide long distance telephone service (Section 214) but also *obligated* the existing telephone companies to interconnect their local facilities in order to help MCI compete in that market (Section 201(a)). Moreover, said the court below, the

[31] *Execunet I,* 561 F.2d at 380, Pet. App. 30i (footnote omitted).

Commission is powerless to stop or contain competition or interconnection in the long distance telephone market until and unless it finds, after completion of the proceeding instituted in compliance with the *Execunet I* mandate, that competition adversely affects the public interest.[32]

Each of these steps beyond the finding of Commission error is, we respectfully submit, an excess of judicial activism warranting summary reversal. *Vermont Yankee, supra,* while specifically and recently directed to the District of Columbia Circuit is not new law. *Pottsville Broadcasting, supra,* quite clearly drew the distinction between a mandate from court to court and court to an administrative agency, (309 U.S. at 141-144) and found that the Court of Appeals, when it had "laid bare [the] error [of the agency], exhausted the only power which the Congress gave it" (309 U.S. at 145). In authorizing competition and requiring interconnections, the court below has ignored the teaching of *Pottsville.* Both functions are quite clearly vested in the agency, not the court; and as the court's mandamus to FCC was set aside in *Pottsville,* so too must the *Execunet* court's usurpation of agency functions be reversed here.

II. Conflicting Decisions Are Not Reconciled By Nullifying One.

The efforts of the *Execunet* court notwithstanding, there remains an unreconcilable conflict between the Third and District of Columbia Circuits. The treatment accorded the Third Circuit's in-depth exploration and resolution of the interconnection issue by the court

[32] *Execunet II, slip op.,* at 15, Pet. App. 14a. MCI has estimated the time required to complete this proceeding to be "several years" (MCI Opposition to Motions for Stay, April 20, 1978).

below can only be described as at best, cavalier, and at worst, rendering wholly without meaning the entire Third Circuit proceeding.

In *Execunet I*, the court distinguished *Bell of Pennsylvania, supra*, on the ground that it "involved a very different issue, namely whether the Commission had affirmatively determined that it would be in the public interest to require A. T. & T. to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970)." [33] In *Execunet II* the lower court "changed positions as nimbly as if dancing a quadrille," [34] and now finds in the Third Circuit's broad construction of *Specialized Carriers, supra*, ". . . strong support—not conflicting authority—for the similarly broad construction we accorded in *Execunet* to *Specialized Carrier* [sic] . . . ." [35]

What the *Execunet* court consistently refuses to acknowledge in either its effort to distinguish or its claim of support is the fact that central to the Third Circuit's interconnection ruling is the basic question of what competitive services MCI had been authorized by FCC to provide. If MCI is indeed the holder of unlimited authorizations and correspondingly unlimited rights to interconnection, as *Execunet II* holds, the Third Circuit's deliberations on the scope of MCI's authorizations were purely academic. The Third Circuit's opinion in *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (3d Cir. 1974) is peculiarly pertinent and in-

[33] *Execunet I*, 561 F.2d at 378, n.59; Pet. App. 24i-25i.

[34] *Vermont Yankee, supra*, at 4306, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 87 (1953).

[35] *Execunet II, slip op.* at 18-19, Pet. App. 17a.

structive here. In that case a preliminary injunction requiring specified interconnections had been issued by the District Court. In vacating the injunction, Circuit Judge Van Dusen, for the court, wrote:

> "Deferral to the FCC under the doctrine of primary jurisdiction is particularly appropriate in this case not simply because of *the fact of uncertainty concerning the issue of what private line services have been authorized*, but also because of the nature of the issue. *For a court to resolve this issue results in a judicial determination of the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T. Such a determination*, involving, as it must, the comparative evaluation of complex, technical, economic and policy factors, as well as consideration of the public interest, *should be made, in the first instance by the administrative agency* which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy." 496 F.2d at 222 (footnote omitted, emphasis supplied).

The result of this decision was *Bell System Tariff Offerings, supra*, which was then affirmed in *Bell of Pennsylvania, supra*.

In the case at bar, FCC did indeed make its determination in the first instance—that it had affirmatively authorized MCI to offer private line service and only private line services. But in *Execunet I* and *Execunet II* the court below made new law—an affirmative FCC authorization pursuant to Section 214(a) [36] of the

[36] Section 214(a) (47 U.S.C. 214(a)) provides in part that:

"No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any

Communications Act cannot be limited to the authority applied for unless FCC conditions its grant pursuant to a separate and additional public interest finding under Section 214(c), and telephone companies interconnection obligation are measured by that same unlimited standard, not by Section 201(a).[37]

The culmination of the Commission's deliberations on how to conduct its affairs under this novel and judicially prescribed procedure, following a three month's freeze on all applications, is a remarkable new routine in which the affirmative finding of public convenience and necessity in each processed application is conditioned on the outcome of the proceeding instituted by the Commission, in response to *Execunet I*, to determine whether the public convenience and necessity require competition in the provision of long distance telephone service.[38]

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line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line. . . ."

[37] Of particular concern to the Independents in this context is the apparent elimination of the requirements of Section 201(a) from the statute, and the denial to the Independents of the right to hearing before the Commission on interconnection matters specifically acknowledged by the Third Circuit. See *Bell of Pennsylvania, supra*, at 1273, n.31a.

[38] How a finding today that the public convenience and necessity require the construction or operation of a new line can be conditioned on the outcome of a proceeding to determine whether the public convenience and necessity require that construction and operation, puzzling at best, is but one result of judicial intrusion into the administrative process. For the Court's convenient reference, a copy of a typical FCC authorization under the new procedure is attached as Exhibit A.

Unlike the Third Circuit, the *Execunet* court, regrettably, did not allow the FCC to conduct the proceeding ordered [39] by *Execunet I* and determine in the first instance ". . . the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T." Rather, by the judicial fiat of *Execunet II* long distance telephone competition is authorized, and interconnection is required, even in the judicially acknowledged absence of any administrative public interest findings as to either authorization or interconnection, and must be permitted to continue and expand "until and unless it was found that the public interest demanded otherwise." [40]

Thus the conflict between the Third Circuit's limited to private line decision and the District of Columbia Circuit's unlimited view remains, and indeed is sharpened by *Execunet II*. The conflict can only be resolved by the Court.

CONCLUSION

Thus has the court below overstepped the bounds of judicial review and usurped the functions of the F.C.C. Thus has the court below reversed the holding in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953) that "*The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard.*" (Emphasis supplied). And thus has the court below reduced the thorough and

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[39] *Execunet I* may be read as leaving the institution of a proceeding to the Commission's discretion. Given the Commission's statutory public interest duty, however, it had no choice but to proceed.

[40] *Execunet II, slip op.* at 15, Pet. App. 14a.

careful deliberations of the Third Circuit to a meaningless semantic exercise, for the entire interconnection proceeding in that court,[41] in which the lawfulness of the FCC order requiring interconnection for MCI's "presently or hereafter authorized" services hinged on its scope, becomes wholly academic if indeed the Execunet court is correct in finding MCI's authorizations unlimited and telephone company interconnection obligations equally unbounded.

For these reasons, the writ should issue to the Court of Appeals for the District of Columbia Circuit, and this case should be set for plenary review.

Respectfully submitted,

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August 7, 1978

[41] *MCI* v. *AT&T, supra; Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974).

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. I-T-C-2621

In the Matter of

WESTERN UNION INTERNATIONAL, INC.

Application for authority to acquire and operate facilities between New York and Washington, D.C.

ORDER AND AUTHORIZATION

Adopted: July 28, 1978

Released: August 1, 1978

1. Opon consideration of the above-captioned application, filed on Oct. 10, 1975 by Western Union International, Inc. (WUI), we find that a grant of said application will serve the public interest, convenience and necessity;

2. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules on Delegations of Authority. That application File No. I-T-C-2621 Is HEREBY GRANTED, explicitly subject to the following: The authorization of the facilities and services herein shall be subject to possible revocation or modification as a result of any findings, rules, requirements or other actions which may result from or be promulgated by, the proceedings in Common Carrier Docket No. 78-72, "In the Matter of MTS and WATS Market Structure," FCC 78-144 (March 3, 1978) or Common Carrier Docket No. 78-96, "Regulatory Policies Concerning the Provision of Domestic Public Message Services By Entities Other Than the Western Union Telegraph Co. and Proposed Amendment to Parts 63 and 64 of the Commission's Rules," FCC 78-184 (March 28, 1978). The grantee is afforded 30 days from the release of this order to decline this authorization as conditioned. Failure to

respond within this period will constitute formal acceptance of the authorization as conditioned;* and

(A) WUI is authorized to:

(1) lease from AT&T and operate 11 voice circuits between its operating offices in New York and Washington, D.C.;

(2) use said facilities to provide those services WUI was authorized to provide by the Commission's Order and Authorization adopted April 8, 1964, File No. T-C-1749 *et al,* as modified by the Commission's Memorandum Opinion, Order and Authorization adopted Dec. 21, 1967, File No. T-C-2135 *et al,* between the United States and over-

* Heretofore, when evaluating whether the public convenience and necessity required the construction and operation of proposed new channels of communications, the Commission believed it sufficient to consider the application "as applied for," i.e. limited to those specific classes of service offerings mentioned in the application or specifically authorized by prior Commission action. However, the Court has recently held that a carrier may introduce new service offerings using existing facilities merely through the filing of appropriate tariffs, unless such use of the facilities has been explicitly restricted based on an adequate public interest determination at the time of authorization. *MCI Telecommunications Corporation* v. *FCC,* 561 F.2d 365 (D.C. Cir. 1977). Pursuant to this legal interpretation, it appears that carriers may now enter and compete in various communications markets, including public message service markets as well as competitive markets from which they were previously precluded, employing both their existing facilities and any additional facilities the Commission may authorize without the requisite limitations based on appropriate public interest fiindings. In order to determine whether the public interest requires any regulatory controls or restrictions on the future market structure for public message telephone and telegraph services, and if so, the nature of any such restrictions, the Commission has instituted CC Docket Nos. 78-72 and 78-96. Pending the results of those proceedings, we believe the public interest requires that we condition all further facility authorizations on their outcome.

seas points WUI is authorized to serve and beyond;

(3) subdivide the voice circuits authorized herein in accordance with the Commission's Memorandum Opinion, Report and Order adopted Feb. 13, 1974, Docket No. 18348;

(B) The Commission's temporary authorizations, granted Sept. 19, and Oct. 20, 1975 and expiring Dec. 31, 1978, authorizing the facilities requested in the instant applications, are hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ JOEL S. WINNIK

for Charles R. Cowan
Chief, Facilities & Services Division

Nos. 78-216, 78-217 and 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA and MCI TELECOMMUNICATIONS CORP. ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and MCI TELECOMMUNICATIONS CORP. ET AL.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 580 F. 2d 590. The opinion of the Federal Communications Commission (Pet. App. C) is not yet reported. An earlier opinion of the court of appeals (Pet. App. B) is reported at 561 F. 2d 365.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1978, and petitions for rehearing were denied on May 8, 1978 (Pet. App. D). The petitions in No. 78-216 and No. 78-217 were filed on August 7, 1978. The petition in No. 78-270 was filed on August 17, 1978, within the time permitted by an order extending the time for filing the petition. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Federal Communications Commission issued a declaratory order that American Telephone and Telegraph Company has no obligation under 47 U.S.C. 201(a) to interconnect its facilities with the facilities of MCI Telecommunications Corp. that are to be used by MCI to provide a telephone service known as Execunet. The question presented is whether the court of appeals erred in concluding that that declaratory order was inconsistent with the court's previous

[1] "Pet. App." refers to the Appendix to the petition in No. 76-270.

decision that the Commission had authorized MCI to provide Execunet service and with its previous mandate remanding the case to the Commission for further proceedings in accordance with the court's decision.

STATUTES INVOLVED

Sections 201(a), 214(a) and (c) of the Communications Act of 1934, 47 U.S.C. 201(a), 214(a) and (c), state, in pertinent part:

> *Section 201(a).* It shall be the duty of every common carrier engaged in interstate and foreign communication by wire or radio * * *, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers * * *.
>
> *Section 214(a).* No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.
>
> *Section 214(c).* The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof

* * *, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * *

STATEMENT

In 1971 the Federal Communications Commission issued certificates under Section 214 of the Communications Act of 1934, 47 U.S.C. 214, to respondent MCI Telecommunications Corp. and its affiliates ("MCI"). The certificates authorized MCI to operate a transcontinental point-to-point microwave system, and were issued pursuant to a Commission policy permitting broad entry into the market for "private line" or business data communication services, as distinguished from public telephone service. *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), aff'd, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

In September 1973, shortly before MCI was scheduled to commence operation of its New York-Dallas and intermediate point service, petitioner American Telephone and Telegraph Company ("AT&T") refused to provide interconnections [2] to MCI for two of MCI's proposed services, known as foreign exchange

[2] MCI and the other specialized carriers provide only the long-distance (and usually interstate) portion of their service offerings via their own microwave communications facilities. To reach its customers, however, MCI needed the local telephone company (usually an AT&T affiliate) to connect MCI's long-distance facilities to MCI's customers' plants or offices. For these original "private line" services MCI required only a "local loop," that is, a single circuit of wire connecting the telephone or telephones of its customers to the MCI transmission facility located in the outskirts of the city.

(FX) and common control switching arrangement (CCSA).[3] AT&T claimed that MCI had no authority to provide those services. MCI applied for an order under Section 201(a) of the Communications Act requiring AT&T to interconnect to provide local exchange service, and the Commission ordered interconnection. The Commission stated that while FX and CCSA were "not specifically mentioned in the *Specialized Common Carrier Services* decision, this is because we were concerned with private line services generally, and did not specifically focus on interconnection for FX and CCSA services or any others."

[3] Foreign exchange service provides the MCI customer with a single interstate line connecting him to a distant city giving him, in effect, a local telephone in that city. Thus, a New York businessman with FX service to Washington has a line connecting him to the local Washington exchange system; he may dial local Washington numbers as though he had a telephone there, and people in Washington can call a local Washington number to reach the New York businessman. This device gives the distant private line customer "switched" access to public local exchange service in the distant city. The interconnection required for this service at the distant city is complete local exchange service and not just a local loop (Resp. MCI Br. at 7).

Common control switching arrangement service permits a customer with many office locations to connect them to each other without having to go through the regular switching system. Like FX, however, it requires interconnection for local exchange service.

Bell System Tariff Offerings, 46 F.C.C.2d 413, 425 (1974). The Commission further stated (46 F.C.C.2d at 426-427): "Our orders herein therefore make clear that [the Bell system] is to provide interconnection for all of the authorized services of the specialized carriers, including FX and CCSA." The court of appeals for the Third Circuit upheld the Commission's orders. *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (1974), cert. denied, 422 U.S. 1026 (1975).

In September 1974 MCI filed a tariff with the Commission proposing to offer its subscribers a new service called "Execunet." With this service any MCI subscriber can connect with any telephone in a distant city that is served by MCI simply by dialing the local MCI number, an access code connecting him with MCI's point-to-point intercity microwave link, and the telephone number in the distant city. AT&T objected that the Execunet tariff amounted to an offer of long distance message telephone service, not "private line" service. The Commission agreed with AT&T and held that because Execunet was not a "private line" or a "specialized" service, it was not a service that the *Specialized Common Carrier* decision had authorized MCI to provide. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (1976).

On petition for review by MCI, the court of appeals reversed (Pet. App. 1B-33B) (*"Execunet I"*). The court held that under the scheme of the Communications Act, a carrier may provide any service over a line certificated under Section 214(a), unless the

Commission has imposed service restrictions in the certificate pursuant to Section 214(c) and has found, as Section 214(c) requires, that such restrictions are required by the public convenience and necessity (*id.* at 18B-26B). The court noted that MCI's certificates did not contain service restrictions, and held that the Commission's *Specialized Common Carrier* decision did not constitute a determination that the public convenience and necessity required such service restrictions (*id.* at 26B-31B). The court noted that the Commission was free, either through the tariff mechanisms of Sections 203-205 or through rulemaking, to consider and determine whether the public interest and necessity warranted prohibiting services like Execunet, and remanded to permit the Commission to undertake such proceedings if it chose to do so (*id.* at 32B).

The three petitioners here all petitioned this Court for certiorari, claiming that the decision was in conflict with the court of appeals' decisions in *Bell Telephone Co. of Pennsylvania, supra*, and *Washington Utilities and Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975) and that the court of appeals erred in its interpretation of Section 214 (Nos. 77-420, 77-421, and 77-436). The Commission argued that in both of those cases the conclusion that *Specialized Common Carriers* was limited to private line services was "an essential premise for the analysis" or an "essential part of [the] decision" (77-436 Pet. 13, 15). The United States filed a memorandum stat-

ing that the Section 214 issues warranted review but otherwise reserving its position on the merits. This Court denied the petitions, 434 U.S. 1040 (1978).

Following the denial of the petitions, the Commission instituted a rulemaking proceeding to determine whether competition in long distance services would serve the public interest. *In the Matter of MTS and WATS Market Structure*, 67 F.C.C.2d 757 (1978). That proceeding is still pending.

On the day the petitions were denied AT&T asked the Commission for a declaratory order that it was not required to interconnect with MCI to provide local exchange services for Execunet. AT&T argued that *Execunet I* dealt only with MCI's authority under its Section 214 certificates, and not AT&T's obligation to interconnect under Section 201 and the Commission's decision in *Bell System Tariff Offerings, supra.* AT&T claimed that the latter decision concerned only private line services and did not apply to Execunet. On February 23, 1978, the Commission issued an opinion accepting AT&T's position (Pet. App. 1C-52C).

MCI then asked the court of appeals for an order directing AT&T and the Commission to comply with the mandate of *Execunet I*, and the court granted MCI's motion (Pet. App. 1A-24A) (*"Execunet II"*). The court held that its decision in *Execunet I "did* clearly contemplate—by virture of AT&T's representations and actions—that AT&T was required to provide interconnections for Execunet service" (*id.* at

12A; emphasis in original).[4] Furthermore, the court held that, contrary to the Commission's claim, the Commission itself had ordered AT&T to interconnect with Execunet in the Commission's *Bell System Tariff Offerings* decision, which, in the Commission's own words, constituted "broad interconnection orders * * * [requiring] Bell * * * to provide interconnection for all of the authorized services of the specialized carriers * * *" (Pet. App. 20A). Since *Execunet I* held that Execunet was an authorized service, the court concluded that the Commission's declaratory order that AT&T was not required to provide interconnection for that service was inconsistent with the *Execunet I* decision (Pet. App. 14A-18A). The court also

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[4] Thus the court stated (Pet. App. 12A-13A; footnote omitted):

> Never in the proceedings before this court did AT&T even suggest that it was not required to provide these connections, or that the question of MCI's authority to provide or expand its Execunet service was, as a practical matter, of no consequence since AT&T could and would refuse to provide the essential interconnections should we decide in MCI's favor. Quite to the contrary, in securing the modification of our original stay, in its briefs and arguments to this court, and in its petition for certiorari, AT&T consistently emphasized that a decision in favor of MCI *would* lead to vigorous and adverse competition—a result which would occur only if AT&T was required to provide the necessary interconnections for Execunet. AT&T expected and encouraged this court to take account of these representations in reaching our decisions in the Execunet matter; certainly, it did not assume that in so doing we would at the same time ignore the underlying assumptions supporting the claims of competition.

rejected the Commission's claim that the Third Circuit's opinion in *Bell Telephone of Pennsylvania*, upholding the *Bell System Tariff Offerings* orders, conflicted with its conclusion (*id.* at 18A-24A).[5]

The court of appeals subsequently denied motions to stay its mandate.

ARGUMENT

Petitioners argue that the court of appeals erred in concluding that the Commission's declaratory order was inconsistent with the Court's mandate in *Execunet I* because, they contend, *Execunet I* concerned only MCI's authority under Section 214 of the Act to provide Execunet and did not concern AT&T's obligations to interconnect with Execunet, which are governed by Section 201 of the Act. They further contend that the declaratory order was correct because Section 201 requires the Commission affirmatively to make a public interest finding before it can order a carrier to interconnect and that the Commission never made such a finding with respect to Execunet. They also claim that *Execunet II* is in conflict with the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania, supra*, which, they contend, held that AT&T's interconnection obligation under the Commission's order in *Bell System Tariff Offerings* was

[5] The court also noted (Pet. App. 11A-12A) that under the Commission's declaratory order, which did not distinguish between existing and future interconnections, AT&T could withdraw the interconnections that Execunet now uses, thus eliminating the service altogether.

limited to "private lines services," which Execunet is not. None of the petitioners, however, challenge the court of appeals decision in *Execunet I*, and the Commission's petition expressly states that it "assumes that *Execunet I* is now binding on the Commission" (Pet. 8, n. 3).[6] While petitioners' contentions are not without some force, we believe that the court of appeals' decision was correct, and that in any event it does not warrant this Court's review.

1. It is true, as petitioners contend, that *Execunet I* did not expressly deal with AT&T's interconnection obligations under Section 201, and it is also true, as a general matter, that when the Commission authorizes one carrier to construct and operate a line under Section 214, it does not necessarily follow that other carriers would be obligated under Section 201 to provide interconnections with that carrier. Section 201 requires the Commission to make a separate finding that the public interest warrants interconnections.

But we do not read the *Execunet II* decision as a determination by the court of appeals of the public interest finding which Section 201 requires the Commission to make. Rather, what the court decided in *Execunet II* was that the Commission itself had already made the required public interest finding in *Bell System Tariff Offerings*, when it "broadly" ordered AT&T to interconnect for "all of the authorized services of the specialized carriers." Since *Exec-*

[6] We doubt that such an assumption would be required by this Court's denial of petitions for a writ of certiorari to review the *Execunet I* decision.

unet I (which petitioners do not now challenge) held that Execunet was one of those authorized services, it follows from the Commission's own order that AT&T is required to interconnect with it.

Petitioners argue, however, that the Commission did not contemplate services like Execunet in *Bell System Tariff Offerings* or in *Specialized Common Carriers* (and indeed expressly excluded such services from consideration). But the court concluded, correctly in our view, that those arguments were the very ones rejected in *Execunet I* and are inconsistent with the rationale of that decision. Moreover, in *Bell System Tariff Offerings* the Commission itself rejected the proposition that AT&T is obligated to provide interconnections only for those services expressly contemplated in that decision or its earlier *Specialized Common Carriers* decision. The very purpose of the Commission's "broad" interconnection order in *Bell System Tariff Offerings* was to avoid the necessity of reexamining AT&T's obligation to interconnect each time one of the specialized carriers offered a new service through its tariffs.

2. Petitioners also argue that the decision below is in conflict with the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania* upholding the interconnection orders in *Bell System Tariff Offerings*, but in our view, the conflict, if any, does not require this Court's review. Those arguments are based on the fact that the Third Circuit had rejected AT&T's claim that the Commission's orders were overly broad and vague. The court stated that unless the orders were given some limiting construction "we

would be inclined to agree" with AT&T's argument, but concluded that the orders should be construed in the context of what the Commission was considering. So considered, it appeared to the Court that AT&T was required "to provide [those interconnection] elements of private line services which AT&T supplies to its affiliates * * * [and] customers * * *." 503 F.2d at 1273-1274.

Whether that analysis, in the context of a decision upholding what the Commission itself described as "broad" orders, is holding or *dicta*, is debatable.[7] But in our view the conflict, if any, does not warrant this Court's review because, as the court below noted (Pet. App. 23A), the Commission itself has not given and does not give the Third Circuit's language the literal reading that would be necessary to establish the kind of conflict petitioners claim exists. The Third Circuit's opinion refers only to "private line services," but the Commission in its declaratory order has construed its *Bell System Tariff Offerings* decision and the Third Circuit's opinion as requiring AT&T to interconnect with other "specialized services" that are not "private line services" and has explained the Third Circuit's use of the term "private line" as merely an "abbreviated expression" (Pet. App. 39C; see also Pet. App. 23A-24A). By the Commission's

[7] The Third Circuit's statement that otherwise it "would be inclined to agree" with AT&T's arguments, even if technically a holding, certainly does not reflect careful consideration of the very issue before the District of Columbia Circuit in *Execunet II*, and does not create the kind of conflict that this Court should resolve.

own analysis, therefore, the alleged conflict is hardly clear.

3. While the Commission's reading of its own statutes and its assessment of the administrative impact of the decision below are entitled to considerable deference, we do not see how the decisions below can significantly impair the Commission's performance of its statutory responsibility. Neither *Execunet I* nor *Execunet II* precludes the Commission from considering and determining whether the public interest will be served or disserved by MCI's continued provision of the Execunet service. Indeed, the Commission has commenced a broad inquiry on that and related issues. We see no reason why *Execunet I* or *Execunet II* should have any effect on the outcome of that inquiry, and the Commission has not suggested that it would. Nor do we see any important or recurring issue of administrative or communications law presented, since the decision below is based, in the last analysis, on the court of appeals' determination of what the Commission in fact decided in its *Bell System Tariff Offerings* decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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No. 78-270

In the Supreme Court of the United States

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v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO "BRIEF FOR THE UNITED STATES IN OPPOSITION"

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PETITIONER'S REPLY TO "BRIEF FOR THE UNITED STATES IN OPPOSITION"

The United States, through the Solicitor General,[1] has opposed the petition of the Federal Communica-

[1] Because the Solicitor General obviously does not represent the Commission here and because the Department of Justice did not participate in the D.C. Circuit proceedings which led to the *Execunet II* decision, we question exactly what interests of the United States the Solicitor legitimately represents in this case. This situation is especially troubling because on

tions Commission and the companion petitions of the United States Independent Telephone Association (No. 78-216) and the American Telephone and Telegraph Co. (No. 78-217).

1. The United States makes no attempt to reconcile its position now with the brief it filed on behalf of the FCC successfully opposing the petition of AT&T for certiorari to the Third Circuit in *Bell Telephone Co. of Penn.* v. *FCC*, the decision which conflicts with the D.C. Circuit decision here under review.[2] In that brief,[3] which explicitly distinguished "private line" service from MTS/WATS-type services,[4] the United States assured this Court that AT&T was afforded adequate notice in the FCC's interconnection proceedings and that the interconnection orders were not overbroad, because the orders were limited to interconnection for private line services.

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another occasion before this Court, the Solicitor did represent the Commission with respect to the same Commission orders that are now under review, and, at that time, pressed on our behalf an interpretation of those orders that is consistent with our present petition and inconsistent with the Solicitor General's present opposition. See Brief for the Respondents in Opposition, *AT&T* v. *FCC*, No. 74-1229, *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). Even now, in its brief on behalf of some unspecified government interest, the Solicitor concedes that the petition is "not without some force." U.S. Opposition 11.

[2] 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[3] Brief for the Respondents in Opposition, *supra* n.1, No. 74-1229.

[4] *Id.* at 8.

Tracking the Third Circuit's opinion, the brief explained that AT&T had notice "that the inquiry encompassed all *private line* service offerings * * *." Brief in No. 74-1229, p. 16 (emphasis added). The brief relied upon the fact that the Third Circuit's (and the FCC's) "computations of possible revenue diversions from AT&T were based upon AT&T's total revenues from all *private line* services * * *." *Id.* at 17 n. 9 (emphasis added).[5] The brief also described the FCC's *Specialized Common Carrier Services* proceeding,[6] which was the source of the interconnection obligation as well as the policy of competition, as a rulemaking to determine "whether to open AT&T's near monopoly in *private line* service to competition and [to select] the means of insuring that new competitors would obtain local distribution." *Id.* at 12 (emphasis added). It concluded, quoting the Third Circuit, that AT&T had a fair opportunity to "present its arguments against the *proposed* interconnection." *Id.* (emphasis added).

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[5] Compare that analysis with the FCC's analysis of the scope of interconnection at Pet. 23-24 in this case.

[6] 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See also Brief for the Federal Respondents in Opposition to certiorari in that case, *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, No. 74-1550, where the FCC and the United States, through the Solicitor General, characterized the case as involving only "private line service" or "specialized communications services," as contrasted with public telephone service. Brief, pp. 2, 3, 5, 6.

In response to AT&T's argument that the interconnection order was "impermissibly overbroad," the brief relied once again on the Third Circuit's analysis. It argued that the interconnection obligation "must be read in context as requiring AT&T to furnish those interconnection 'elements of *private line* services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department' * * *." *Id.* 20 n. 10 (emphasis added). Such a requirement, the brief concluded, "is not overbroad." [7] *Id.*

We submit that the brief in No. 74-1229 is irreconcilable with points 1 and 2 of the brief for the United States in this case.[8] The brief in No. 74-1229 was intended to assure this Court that certiorari was unwarranted, in large part because the "notice" and "overbreadth" arguments of AT&T presupposed broader orders than the Commission had issued. The

[7] In addition to the quoted portions, the general tenor of the brief in No. 74-1229 presupposes a limited interconnection obligation. The brief plainly intended to persuade this Court that AT&T's complaints of an unbounded obligation were unfounded.

[8] This is not merely a debating point, of course, intended to show that the United States has not been consistent. Our argument is that the Third Circuit decision was correct and controls the interconnection question, and that the United States was correct in its brief in No. 74-1229 but wrong in its contradictory brief in this case. As we pointed out in our petition, the Third Circuit explicitly decided that the Commission had excluded MTS and WATS from consideration in its interconnection inquiry. Pet. 24. See AT&T Pet. App. 34g. See also Pet. 17 n. 20.

United States' brief in this case is intended to assure the Court that there was no error below in construing the same interconnection orders so broadly as to have no bounds. The United States may not have it both ways.

2. The United States apparently regards as significant the FCC's statement in the declaratory ruling (Pet. App. 39C-40C) that its specialized carrier policy embraced some specialized services the established carriers had not theretofore regarded as "private line." U.S. Opposition 13. But the Commission there was merely recognizing that one of the specialized carrier applicants, the Data Transmission Corp., had proposed an end-to-end all digital data network that included switching. Concededly, this was not a traditional private line service; but it surely was a far cry from ordinary long distance telephone service (MTS). See *Specialized Common Carrier Services*, 29 FCC 2d 870, 874-76 (1971).

The crucial fact, however, is that none of the applicants in the *Specialized Common Carrier* proceeding proposed anything resembling MTS or WATS or Execunet service. *Those* classes of service therefore were excluded from the Commission's consideration —both for purposes of Section 214 certificates and for purposes of interconnection pursuant to Section 201(a). Pet. App. 39C-41C. Our argument is that the exclusion of such services as MTS, WATS and equivalent services from consideration meant that the Commission could not have ordered interconnection for the purpose of providing those services. *Id.* This

was so because, as the Commission reasoned in its declaratory ruling, a contrary decision would mean that "all the telephone companies were deprived of a meaningful opportunity for a hearing with respect to the public interest consequences * * * of such interconnection." Pet. App. 41C. Thus, the Commission's candid explanation of its reading of *Specialized Common Carrier Services* does not undercut in any way its conclusion that AT&T had no obligation, under outstanding FCC orders pursuant to Section 201(a), to provide interconnection facilities that would enable MCI and others to offer MTS, WATS and equivalent services such as Execunet.

It is one thing to concede, as the Commission did in its declaratory ruling, that the bounds of the interconnection obligation were a little bit fuzzier and less precise than the Third Circuit had articulated them. It is quite another thing to assert, as the Solicitor General's brief and the D.C. Circuit's opinion would do, that the interconnection limitations imposed by the Commission and affirmed by the Third Circuit have no substance, so that the orders in fact were "unbounded." The Solicitor and the D.C. Circuit perceive universal interconnection obligations that reach MTS, WATS, and equivalent services such as Execunet. It requires no "literal reading" of the Third Circuit's opinion to find a direct conflict with that perception. U.S. Opposition 13.

3. The United States cannot "see how the decisions below can significantly impair the Commission's performance of its statutory responsibility." U.S. Opposition 14. Nor does it see any "important or recurring issue of administrative or communications law" that would warrant this Court's attention. *Id.*

It is true that the Commission has commenced a broad inquiry (the MTS/WATS inquiry) into long distance telephone service competition, which will consider interconnection issues as well as certification issues.[9] But that inquiry likely will take years to complete, because the issues are complex and the policy ramifications are far reaching. In the meantime, judge-made policy will govern this important segment of public utility service. The Commission must make day-to-day regulatory decisions on new tariff filings by MCI and other specialized carriers for MTS/WATS-equivalent services, as well as any tariffs AT&T or another telephone company files to provide interconnection. The D.C. Circuit's command that the FCC do nothing to impede "MCI's right to enter the market now", Pet. App. 10E, will substantially influence the FCC's decisions on those matters.

Whether the FCC theoretically will be able to reclaim its proper policy-making role after completion of the MTS/WATS inquiry, we submit, is beside the point. The D.C. Circuit's decisions, in effect, have turned Congress' scheme for the regulation of com-

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[9] *In the Matter of MTS and WATS Market Structure*, FCC 78-144, released February 28, 1978 ("MTS/WATS Inquiry"). We pointed out this proceeding to the Court at Petition, p. 13 and n. 15, and Petitioner's Reply, n. 26 at p. 14.

munications on its head.[10] They have established judge-made policy which will prevail unless and until the FCC, after affording due administrative process, can make a decision that will pass muster with the same judges who established the prevailing policy. This raises issues that are both important and, in this very case, recurring. The Court should grant the petition for certiorari.

Respectfully submitted,

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[10] The United States apparently finds it unimportant to have the anomalous situation of a regulatory agency setting out to make public interest findings that will either affirm or reverse the policy decisions of the court of appeals.

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IN THE

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MCI TELECOMMUNICATIONS CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-216, 78-217, 78-270

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether parties may frustrate an order of a court of appeals by implicitly conceding a critically important aspect of their case during judicial review and then, after denial of certiorari, asserting the matter as a

defense for their non-compliance with the judicial mandate?

STATEMENT OF THE CASE

On July 28, 1977, the United States Court of Appeals for the District of Columbia Circuit reversed an order of the Federal Communications Commission requiring MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. to cease providing Execunet service to their customers. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (1977), *cert. denied*, 434 U.S. 1040 (1978) (*"Execunet I"*).[1] On January 16, 1978, this Court denied certiorari as to *Execunet I*. Within hours after the denial, AT&T filed with the FCC a petition seeking a ruling that it was under no obligation to furnish the local interconnections that were absolutely necessary to make Execunet service work and began, effective immediately, to refuse further interconnections. A divided FCC granted the requested endorsement of AT&T's action on February 23, 1978.[2]

MCI immediately sought relief from the United States Court of Appeals for the District of Columbia Circuit by filing a motion for an order directing compliance with the court's mandate in *Execunet I*. On April 14, 1978, the court issued an order,[3] accompanied by a detailed opinion,[4] directing such compliance (*"Execunet II"*). Motions for rehearing and suggestions for a rehearing *en banc*[5] were denied, with no judge of the circuit court voting to grant such motions. The court also denied motions for a stay of its order pending disposition of

[1] AT&T App. 1i.

[2] AT&T App. 1c.

[3] AT&T App. 1d.

[4] AT&T App. 1a.

[5] AT&T App. 1e and 2e.

petitions for a writ of certiorari.[6] Applications for a stay pending disposition of the petitions for certiorari addressed to the Chief Justice of the United States, which were forwarded by him to the other Justices of this Court, were denied.[7] Petitions for certiorari were filed in August, 1978. The United States, a statutory respondent below, did not join in the FCC's petition.

Background

MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C Inc. (collectively "MCI") are affiliated communications common carriers, operating a transcontinental system providing long distance business and data communications services among various metropolitan areas throughout the United States.

MCI's system is constructed to provide communications capacity only between MCI's in-city terminals and not beyond those terminals out to the points to which its customers wish their communications brought. In this regard, MCI is much like the Long Lines Department of AT&T, MCI's principal competitor in the provision of long distance, intercity communication services. AT&T Long Lines also relies upon local telephone companies, primarily subsidiaries of AT&T, to provide the required local interconnections between its in-city terminals and its customers' desired termination points. It would be both economically burdensome and wasteful to expect those carriers competing for the intercity communications market each essentially to duplicate the existing facilities of the local telephone companies. As a result of AT&T's ownership of the largest local telephone companies and its domination of the rest through revenue sharing agreements, the Long Lines Department has not

[6] AT&T App. 1b.

[7] Order of May 22, 1978.

experienced any difficulties in obtaining whatever local interconnections it requires. Long Lines' competitors, on the other hand, have been denied interconnections at certain critical times when AT&T has sought to limit the scope of competing intercity services.

Earlier Litigation

Microwave Communications, Inc. received certification in August, 1969 to construct a line between Chicago and St. Louis.[8] In that decision, the Commission recognized that MCI would require the use of local telephone company facilities to extend its intercity services to its customers. Despite AT&T's protests, the Commission held that the issuance of an order requiring the existing carriers to provide such local distribution services would be in the public interest.[9]

Thereafter, the Commission received numerous applications for certification of additional lines from other potential competitors of AT&T. Rather than handling each of these applications on a case-by-case basis, the Commission instituted a rulemaking (the "*Specialized Carrier*" proceeding) to decide a number of general policy questions raised by the applications, including "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; . . ." and, if such entry were permitted, "[w]hat is the appropriate means for local distribution of the proposed services?"[10] The FCC specifically found that a "general policy in favor of the

[8] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970).

[9] 18 FCC 2d at 965.

[10] *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920) Notice of Inquiry, 24 FCC 2d 318, 327 (1970).

entry of new carriers in the specialized communications field would serve the public interest, convenience and necessity."[11] The Commission also held that the established carriers should permit interconnection with the new carriers and reinforced this holding with a reminder that the Commission would not condone any practice whereby any established carrier discriminated in favor of an affiliated carrier with respect to such interconnection.[12]

During the pendency of the *Specialized Carrier* proceeding, the Commission instituted another related rulemaking to consider a proposal that all carriers, before instituting new services on existing facilities, be required to obtain prior Commission consent. After deliberation, the FCC concluded, to the contrary, that both the established and new carriers should be free to institute new service offerings merely by filing tariff revisions, rather than being required to obtain prior authorization from the Commission.[13]

[11] *Establishment of Policies and Procedures for Consideration of Applications to Provide Specalized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920), 29 FCC 2d 870, 920 (1971), *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[12] 29 FCC 2d at 940.

[13] *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities* (Docket No. 19117), 39 FCC 2d 131 (1973). The Commission stated, at 135, that:

> In connection with possible revisions of our tariff rules, we recognize that the termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules.

During 1972 and up to mid-1973, while it was building its initial system, MCI engaged in extensive negotiations with AT&T to obtain adequate local interconnection. By the fall of 1973, however, it was clear that AT&T would not provide MCI with local interconnections required for certain services, including a private line service known in the industry as "foreign exchange" or "FX". FX is a service which gives a customer in one city a line to a distant city which terminates in a business telephone arrangement in a telephone central office there. This gives the subscriber access to the local exchange in the distant city. For example, if a businessman in Washington subscribes to FX service to New York, he can reach all the telephone subscribers in New York City—and can, in turn, be reached by all of them.

To resolve the local interconnection dispute, the FCC initiated a show cause proceeding against AT&T in December, 1973. Relying upon the *Microwave Communications, Inc.* and *Specialized Carrier* proceedings, the Commission reaffirmed AT&T's obligation to furnish MCI and other specialized carriers with the local facilities needed for the rendition of all their authorized services, including FX.[14] The Commission explained that:[15]

> Our orders herein therefore make clear that Bell is to provide interconnection facilities *for all of the authorized services of the specialized carriers, including FX and CCSA.*

Specifically, the Commission ordered Bell to cease and desist from the following practices, among others:[16]

[14] *Bell System Tariff Offerings* (Docket No. 19896), 46 FCC 2d 413 (1974), *aff'd, Bell Telephone Company* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[15] 46 FCC 2d at 427 (emphasis added). "CCSA" (common control switching arrangements) service—for large businesses—was also specifically at issue in Docket No. 19896.

[16] 46 FCC 2d at 439 (emphasis added).

(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers *for their presently or hereafter authorized interstate and foreign communications services*;

* * * *

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers.

The Third Circuit affirmed the cease and desist order in the *Bell Telephone* case.[17]

The Execunet Case

On September 10, 1974, MCI filed a tariff revision to institute a new category of specialized metered use services, which included the service commercially known as Execunet. Execunet is essentially a variation of FX service, the major difference between the two being that Execunet subscribers share groups of FX facilities instead of leasing one or more for their own exclusive use. Execunet subscribers are charged on a time and distance sensitive basis, with a minimum charge of $75.00 per month being assessed in addition to a monthly charge for the interconnection supplied by the local telephone com-

[17] *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). Note that, despite the fact that the underlying *Specialized Carrier* decision was then under review in the Ninth Circuit, AT&T nevertheless chose to appeal in the Third Circuit. This was inconsistent with Bell's new argument advanced in its petition here that the Hobbs Act limits jurisdiction to the circuit where a related case is being, or was, considered.

panies which averages approximately $25.00. Execunet service is available to only a limited number of cities on a thirty-day commitment basis. Subscribers are given identification codes that permit MCI's computerized equipment to identify them as "authorized" to use the service.

Insofar as required local interconnection is concerned, it is important to note Execunet service employs exactly the same type of local telephone company interconnection facilities as does conventional FX service. MCI merely uses these interconnections in a more efficient manner through sharing. The identity between FX and Execunet local interconnection facilities makes it clear that AT&T's real quarrel is not with respect to the facilities requested but rather the use to which MCI intends to put them.

In the spring of 1975, AT&T began a surreptitious campaign of *ex parte* presentations to members of the Commission and its staff against MCI Execunet service.[18] In May, AT&T sent to the FCC a very brief informal letter of protest.[19] Without having even given MCI an

[18] MCI knew nothing of this campaign at the time, but learned of it later. After repeated, but largely unsuccessful, attempts by MCI to put the full facts as to AT&T's *ex parte* meetings on the record of this case, it is now known from subsequently submitted affidavits: (1) that AT&T argued its case forcefully; (2) that there was an arrangement between AT&T and representatives of a major non-Bell telephone company to obtain an Execunet authorization code for use in offering demonstrative evidence regarding Execunet to members of the Commission; (3) that one of the parties to this arrangement stated: "We will bury MCI"; and (4) that at least one individual who occupied a decision-making position with the Commission made a remark showing that he had been influenced into reaching a firm, adverse judgment against MCI. The unprecedented celerity with which the Commission acted in 1975 also makes obvious the effectiveness of AT&T's *ex parte* presentations. Even now, however, MCI does not know all the arguments AT&T advanced since the Commission has rejected every attempt by MCI to find out.

[19] The Commission labeled this an informal complaint. When MCI refused to satisfy the complaint, AT&T's only legal recourse

opportunity to respond to AT&T's *ex parte* communications, the Commission issued a peremptory letter rejecting MCI's Execunet tariff revisions.[20] MCI immediately appealed and was granted a stay by the Court of Appeals for the D.C. Circuit. The Commission then asked the D.C. Circuit to hold the appeal in abeyance while it reconsidered its decision. After it issued its second decision in 1976,[21] which attempted to bolster its 1975 letter order, the Commission joined AT&T in seeking dissolution or modification of the court's stay. AT&T sought protection from what it called the "continuing and ever-increasing diversion of MTS"[22] and expressed the gravest concern about "the drastic scope of MCI's threatened expansion."[23] It produced an affidavit detailing the numerous local exchange interconnections it was providing for Execunet.[24] As a result of such representations, the court

under 47 C.F.R. § 1.721 *et seq.* was to file a formal complaint. It never did so—and the Commission did not require it to comply with the rule—with the result that MCI was effectively denied an opportunity to respond adequately in accordance with the Commission's rules.

[20] 60 FCC 2d 62 (1975).

[21] *MCI Telecommunications Corporation*, 60 FCC 2d 25 (1976).

[22] Motion of AT&T to Dissolve or Modify the Stay and For Expedited Review dated August 18, 1976, p. 22. MTS (message telecommunications service) is AT&T's ordinary long distance telephone service.

[23] Reply of AT&T dated November 6, 1975, p. 4. AT&T explained, at page 15 of its Reply, that:

> Since the expansion plans involved the installation of new local exchange lines in most of the cities beginning in November (*id.* para. 7), AT&T urgently filed its motion by the end of the same week in order to give MCI an opportunity to respond, and the Court an opportunity to act, before MCI initiated substantial Execunet service. . . .

[24] Affidavit of Paul E. Muench dated August 18, 1976, appended to AT&T's motion of the same date.

modified its stay so as to prevent further expansion of Execunet prior to decision on the merits.

Upon consideration of the merits in *Execunet I*, the court reversed the agency's decision. The court held that the *Specialized Carrier* decision must be read broadly and that MCI's existing certifications under Section 214 of the Communications Act[25] permitted it to furnish Execunet service. The court held that only if the Commission has made a determination that the public convenience and necessity require that new services receive advance approval can it reject such a new service. It left to the Commission the opportunity to consider, in a future proceeding, whether the public interest might require such a finding.[26]

In petitioning for certiorari, AT&T made the following representations to this Court:[27]

> If the lower court's decision stands, the telephone companies will be threatened with a *massive diversion* of MTS traffic from the switched network. *This diversion can occur at an extraordinary rate—literally in a matter of months*—because the specialized carriers have thousands of intercity circuits in operation and *they utilize existing local distribution facilities already in place.* Past experience confirms the severity and speed of this threat.

[25] 47 U.S.C. § 214.

[26] MCI had argued not only that its certifications were not subject to pre-existing service limitations, either explicit or implicit, but also that, even if it were assumed *arguendo* that MCI were limited to "private line" service or "specialized" service, Execunet would fall within either of those categories. MCI also argued that it had been deprived of its due process rights in view of the undisclosed nature of AT&T's *ex parte* presentations and in view of the FCC's curtailing of its normal hearing processes. These arguments were rendered moot when the lower court reached its decision that there were in fact no pre-existing conditions on MCI's facility certifications. Despite the fact that *Execunet I* vacated the agency orders under review, however, petitioners here persist in returning to them to contend that Execunet is properly classifiable as "MTS" rather than "private line" or "specialized" service. That contention has been refuted by extensive affidavits and analyses which had been impermissibly ignored by the agency in the decisions the court invalidated. This is one illustration of the attempt by petitioners to circumvent the *Execunet I* decision.

[27] AT&T Petition for a Writ of Certiorari of September, 1977, p. 29 (emphasis added).

The FCC echoed the same theme.[28] Thus petitioners represented to this Court that *Execunet I* would result in rapid expansion of Execunet service, with significant adverse impact on AT&T—a development which could occur only if AT&T is required to provide the interconnections MCI needs for Execunet.

MCI was therefore shocked when it received—only a few hours after the announcement of this Court's denial of the petitions for a writ of certiorari—a pleading from AT&T entitled "Petition for a Declaratory Ruling and Expedited Relief." That document informed MCI that AT&T would provide no more interconnections for Execunet and sought from the Commission a ruling that AT&T was under no obligation to provide such interconnections. MCI opposed the petition, and itself petitioned the Commission for an order directing AT&T to comply with the mandate of the court of appeals in *Execunet I*. The AT&T petition was also opposed by the Department of Justice which stated:[29]

> The Department of Justice reads the *Execunet* decision as affirming the principle that communications carriers, including AT&T and MCI, may offer a full range of telecommunications services under present law and present communications regulations.

[28] For instance, in its Petitioner's Reply of November, 1977, p. 6, n. 9, the FCC argued that *Execunet I* would "bring significant competition" to the established telephone industry.

[29] Comments of the United States Department of Justice dated January 30, 1978, p. 9.

> Without an affirmative finding that the public interest so requires, the FCC is not now free to impose service limitations on either MCI or AT&T.
>
> * * * *
>
> Recent court decisions make it clear that local telephone companies, including AT&T subsidiaries, are affirmatively obliged to offer local interconnection or loop services to other carriers, including MCI, to facilitate lawful services. *Specialized Common Carriers Services*, 29 FCC 2d 870, 940 (1971). *Bell System Tariff Offerings*, 46 FCC 2d 413, (¶ 15) (1974) aff'd sub nom *Bell Telephone Co. of Pa.* v. *FCC*, 503 F.2d 1250 (1974), *cert. denied.*, 422 U.S. 1026 (1974).

Nevertheless, the Commission, on February 23, 1978, granted the AT&T petition. Commissioner Joseph R. Fogarty dissented on the grounds that:[30]

> Clearly the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for provision of such services. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated interconnections necessary for servi authorized therein, and the *Execunet* court found those services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection.

Immediately after the Commission announced its decision, MCI filed with the United States Court of Appeals for the District of Columbia Circuit a Motion for an Order Directing Compliance with Mandate.[31] On April 14, 1978, the D.C. Circuit, holding that the Commission's action was totally at odds with *Execunet I*, granted MCI's

[30] AT&T App. 56c.

[31] Concurrently therewith, MCI filed petitions for review of the Commission's February 23, 1978 decision.

motion.[32] That is the decision (*Execunet II*) which petitioners are asking the Court to review.

ARGUMENT AGAINST GRANTING CERTIORARI

Summary

The unanimous decision of the court of appeals in *Execunet II* basically rejects an attempt to circumvent the rulings in its *Execunet I* decision, with respect to which certiorari was previously denied. Not a single judge of the circuit court voted in favor of rehearing *Execunet II*. The judges of the lower court, as well as the Justices of this Court, have refused a stay of the *Execunet II* decision.

There is no constitutional question at stake. Indeed, there is not even a real question of statutory interpretation involved. The court below did not have to reach the question of whether Section 201 of the Communications Act of 1934, 47 U.S.C. § 201, requires a hearing for an interconnection order, inasmuch as it found that previous interconnection orders of the Commission itself included the interconnections in question.

There is no conflict with the decision of another circuit. Both the decision below and the Third Circuit decision in *Bell Telephone* firmly rejected efforts by AT&T to refuse interconnections to MCI. Petitioners rely unconvincingly on a distorted interpretation of dicta in *Bell Telephone* which has been rejected for sound reasons by the lower court.

When AT&T petitioned for certiorari with respect to *Execunet I*, it represented to this Court, as one of its principal arguments, that MCI would immediately expand its Execunet service at a very rapid rate and thereby divert revenue from AT&T. Without intercon-

[32] AT&T App. 1a.

nections from Bell, however, it would have been utterly impossible for MCI to expand Execunet, so AT&T's representations constituted an implicit admission that it was required to provide such interconnections, absent reversal of *Execunet I*. But just hours after the Court denied certiorari, AT&T suddenly announced that it did not have any such obligation to interconnect—a position not only inconsistent with its representations to the Court but one which meant that the preceding two and a half years of litigation had absolutely no significance, making a travesty of the rulings of the court of appeals and this Court. Clearly, sound judicial administration requires that parties not be allowed to profit from such dissimulation, or from the holding back of arguments for future defense of noncompliance with judicial decisions.

This is particularly true where, as here, the argument now advanced is premised upon a rationale which was rejected in the first decision. Central to the position of petitioners, in both *Execunet I* and *Execunet II*, is the mistaken claim that certain services were excluded from the purview of the 1971 Commission's *Specialized Carrier* decision. This contention was laid to rest by the court in *Execunet I*. However, petitioners are here trying to unearth it once more—to evade the court's rulings and to achieve the very same result that was found unlawful in the first instance. The lower court acted in *Execunet II* to protect its earlier mandate from such sophistic trifling.

Similarly, AT&T now argues that the Third Circuit has exclusive jurisdiction of the case, despite the fact that it never made this claim below—and never moved to transfer the case to the Third Circuit. AT&T may well have realized that the Third Circuit, which denied it the right to refuse MCI interconnections for FX and CCSA, was not likely to let it get away with refusing interconnections for Execunet. Having made its decision to accept the jurisdiction of the D.C. Court, AT&T is not entitled to yet another round of repetitious litigation of this issue.

The lower court's decision does not prevent the administrative agency from considering what future action, if any, concerning the services and interconnections involved here may be in the public interest—and, indeed, the agency has already instituted such a proceeding. *MTS and WATS Market Structure*, —— FCC 2d ——, Docket No. 78-72, FCC 78-144 (adopted February 23, 1978, released March 3, 1978). That is the proper forum for any substantive arguments AT&T can make to support its desire for protected monopoly status.

I. The Lower Court Acted Properly to Protect Its Mandate in *Execunet I*

Never once in the *Execunet I* proceedings before the court did AT&T even suggest that it was not required to provide the local interconnections that are the *sine qua non* for Execunet service.[33] Without such interconnection, the litigation over MCI's authority to provide Execunet service, which was resolved in *Execunet I*, would have been of absolutely no consequence. Indeed, in seeking a modification of the lower court's stay of the agency decision, AT&T had forcefully argued that continuation of the full stay would permit MCI to divert substantial business from AT&T.[34] And once again, when it petitioned for certiorari, AT&T, as one of its primary arguments, assured this Court that if the *Execunet I* decision were allowed to stand, the growth of Execunet service would create in a matter of months a massive diversion of MTS traffic "because the specialized carriers

[33] AT&T App. 9a.

[34] AT&T App. 5a.

have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place." [35] At the time the Court last looked at this case, everyone in the case was in apparent agreement that if the Court denied certiorari the first time it was sought, MCI would expand Execunet. Yet, within hours after this Court denied certiorari, AT&T dramatically renounced the obligation of interconnection it had assumed, and upon which all the parties and the court had relied, during the *Execunet I* litigation. Attempting to take advantage of their own earlier concession that interconnection was not an issue, petitioners now argue that in *Execunet I* the court failed to explicitly discuss interconnection. In *Execunet II*, the lower court rejected this sophistry and made it clear that its first decision "*did* clearly contemplate—by virtue of *AT&T's* representations and actions—that AT&T was required to provide interconnections for Execunet service." [36]

Furthermore, analysis of the decision of the 1978 Commission that AT&T had no obligation to furnish interconnections required for Execunet shows that it is premised on the misconception that the 1971 Commission had excluded certain services from the purview of the *Specialized Carrier* decision—a view that had already been explicitly rejected by the court in *Execunet I*. In *Execunet I*, the court had made it abundantly clear that MCI was free to introduce new services, including Execunet, on the lines which had been certificated pursuant to the *Specialized Carrier* decision—unless and until the agency made a public interest finding to the contrary in an appropriate proceeding. The 1978 Commission, however, simply ignored this holding when it stated its rationale for concluding that AT&T had no obligation

[35] AT&T Petition for a Writ of Certiorari of September, 1977, page 29.

[36] AT&T App. 9a (emphasis in original).

to furnish interconnections for Execunet. It reasoned as follows in paragraph 59 of its decision:[37]

> We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings*, and *Bell Tel. Co. of Pennsylvania*. We believe it is clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. The interconnection discussion in those opinions can only be read to mean that all telephone companies are required to provide facilities and interconnections which the specialized common carriers may need to provide both conventional private line services and new specialized services which may differ from any private line service which was being offered by the established carriers in June 1971.

The majority of the 1978 Commission thus chose to disregard the observation of Commissioner Fogarty that:[38]

> We are bound, therefore, by the law of the case, and we are now required to interpret the *Specialized Carrier* decision in light of the D.C. Circuit's *Execunet* holding.

Commissioner Fogarty further observed that:[39] "Clearly, the D.C. Circuit's findings would be a nullity were we

[37] AT&T App. 35c (emphasis in original).

[38] AT&T App. 56c.

[39] *Id.*

to deny interconnection necessary for provision of such services."

The majority of the Commission, however, indeed did attempt to reduce the court's first decision to a nullity by employing the very same erroneous reasoning previously rejected by the court to obtain the identical result—stopping MCI from providing Execunet. In so doing, however, they violated the principle that an agency "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case," [40] and has a duty to follow "everything decided, either expressly or by necessary implication." [41]

II. There Is No Inconsistency With the Third Circuit

Both the *Execunet I* and *Bell Telephone* decisions firmly rejected efforts by AT&T to deny MCI interconnections. Petitioners rely on distorted interpretations of dicta in the 1974 *Bell Telephone* decision to allege inconsistency. The holding in *Bell Telephone* was affirmance of an FCC cease and desist order interpreting and enforcing interconnection obligations that had been imposed by the 1971 Commission in its *Specialized Carrier* decision. AT&T had been ordered by the Commission to cease and desist from denial or unreasonable delay in establishing connections with specialized carriers for their presently or hereafter authorized interstate and foreign communications services.[42] The Third Circuit affirmed this determi-

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[40] *City of Cleveland* v. *FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), quoting *Yablonski* v. *UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), quoting *Thornton* v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

[41] *City of Cleveland*, *supra* at 348, quoting *Munro* v. *Post*, 102 F.2d 686, 688 (2d Cir. 1939).

[42] *Bell System Tariff Offerings*, 46 FCC 2d 413, 438 (1974).

nation. The only qualification it stated was with respect to "the types of services that AT&T will be required to provide 'hereafter'." [43] The limitation it read into the FCC cease and desist order was with respect to the type of interconnections Bell might be called upon to provide. These would be limited to types of interconnection furnished by local telephone companies to their affiliate—AT&T Long Lines. The context in which this limitation was framed was one in which AT&T had been attempting to make the court believe there might be some technical danger to its facilities resulting from interconnection—an allegation which subsequent experience has shown to have been utterly without foundation. The type of interconnections provided by the Bell System with respect to Execunet is no different from that provided with respect to conventional FX service—which was specifically approved in the Third Circuit case. The petitioners unconvincingly attempt to convert this minor limitation of the 1974 cease and desist order into a broad limitation upon the kinds of services specialized carriers may provide to their customers even with types of interconnection which concededly are similar to those received by Long Lines. Furthermore, the Third Circuit concluded that the prime concern of the Commission in framing its interconnection order was to prevent local telephone companies from treating AT&T's Long Lines Department differently than it treats the specialized carriers.[44] Thus, the types of interconnections required for Execunet, which are provided to Long Lines, must also be provided to MCI. Consequently, if anything, the Third Circuit decision stands in support of, and not in contravention of the *Execunet II* decision.[45]

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[43] 503 F.2d at 1273.

[44] *Id.*

[45] Counsel for the FCC introduces an interpretation, not found in the agency's 1978 decision, of the Third Circuit's treatment of

Petitioners rely heavily on the use of the term "private line" in the Third Circuit opinion. However, use of this term was to be expected inasmuch as FX and CCSA services had long been among what AT&T chose to categorize as "private line" services in its tariffs and they represented the immediate matter in dispute in the 1974 controversy. But as the 1978 Commission itself recognized in paragraph 59 of its decision, the term "private line" was used as an abbreviated expression or shorthand for a broader category:[46]

> It is true that the Specialized Carrier decision encompassed specialized communications services other than those which theretofore had been described by the established carriers as "private line" services. It is also true that in the ensuing debate and litigation regarding required interconnection arrangements, the term specialized communications service was frequently omitted in favor of the more limited term "private line." The use of this abbreviated expression apparently arose as a result of the context in which these issues were raised, i.e., whether the specialized carriers should be accorded the same interconnection rights as were accorded AT&T's internal operations in Bell's offering of "private line" services.

The ordering clauses of the 1974 cease and desist action make it abundantly clear that Bell was required

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AT&T's 1974 notice argument. But this new argument ignores the fact that the Third Circuit's conclusion with respect to the notice argument was supported more broadly by the Third Circuit's interpretation of the interconnection order in the *Specialized Carrier* decision. After reviewing that order, the Third Circuit stated, 503 F.2d at 1270:

> If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to AT&T's affiliates. . . . Accordingly, we reject the alternate contention that AT&T did not receive the requisite notice in Docket No. 18920 (1971).

[46] AT&T App. 34c-35c.

to furnish interconnections to the specialized carriers for *all* their authorized services.[47] *Execunet I* established that Execunet was such a service and AT&T's obligation to provide interconnections for it necessarily followed.

III. The Lower Court's Decision Did Not Invade the Third Circuit's "Exclusive Jurisdiction" Under the Hobbs Act

In *Execunet II*, the D.C. Circuit interpreted its own mandate in *Execunet I*. Nothing could be more clearly within the jurisdiction of the D.C. Circuit.

The Third Circuit decision upholding the 1974 cease and desist order became final years ago.[48] The Third

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[47] *Bell System Tariff Offerings*, 46 FCC 2d at 438-439. Refusal to interconnect is fundamentally inconsistent with the policy of assuring "full and fair competition" which was established in *Specialized Carrier*. Nothing could be more destructive of full and fair competition than to have one competitor, with monopoly power over facilities required for the provision of its competitor's lawful services, attempt to foreclose provision of such competing services by refusing access to the facilities required. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377, *reh. denied*, 411 U.S. 910 (1973), the Supreme Court found unlawful the refusal to interconnect by a utility with monopoly power in one service area with smaller municipal systems requiring such interconnection. Full and fair competition requires that those who control access to an essential facility must grant access on reasonable and nondiscriminatory terms to all in the trade. *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *Lorain Journal* v. *United States*, 342 U.S. 143, 154 (1951); *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

[48] The 1978 Commission itself, in the first footnote to its order below (AT&T App. 1c), made clear that the AT&T petition it there addressed could not properly be considered within the framework of the administrative proceeding that had given rise to the 1974 cease and desist order. It declared:

> That petition has been styled as "In the Matters Of BELL SYSTEM TARIFF OFFERINGS of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, dated October 19, 1973, to Laurence E. Harris, Vice President MCI Telecommunications Corpora-

Circuit never had the Execunet controversy before it. The 1974 cease and desist order and the later Execunet orders are quite distinct and encompass different factual and procedural backgrounds. In such circumstances, jurisdiction properly resides with the D.C. Circuit. *Midwest Video Corp.* v. *United States*, 362 F.2d 259, 261 (8th Cir. 1966). The D.C. Circuit has given full effect to the Third Circuit's decision as a final determination of the dispute which was before the latter court.

AT&T's jurisdictional argument is particularly inappropriate in view of the fact that it failed below to move to transfer this case to the Third Circuit, but instead raised its Hobbs Act [49] argument only after it had lost on the merits in the D.C. Circuit. We believe that in making its decision not to raise this argument earlier, AT&T must have realized that the Third Circuit was no more likely to let it get away with refusing Execunet interconnections in 1978 than it had been to let it refuse FX and CCSA interconnections in 1974. Clearly, AT&T is now seeking two bites from the same apple.

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), does not support AT&T's Hobbs Act argument. In that case, the State of Washington was held to be precluded, by virtue of a statute similar to the Hobbs Act, from attacking collaterally in a state court a Federal Power Commission order which had already been reviewed by a federal court of appeals. Indeed, the only relevance the *Tacoma* case has here is that the Court there established that a litigant may not reserve

tion, FCC Docket No. 19896." Inasmuch as Docket No. 19896 has been terminated for more than two years, the petition should have been styled as a new proceeding. The petition and all comments or other pleadings relating to this petition will be filed in the instant proceeding, which shall be considered as separate and distinct from the terminated Docket 19896 proceeding.

[49] 28 U.S.C. § 2341 *et seq.*; AT&T App. 3f.

a "point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had 'exclusive jurisdiction'. . ." 357 U.S. at 339. It is of course just such "piecemeal litigation" that petitioners have been practicing—not merely by failing to raise their Hobbs Act argument in the D.C. Circuit but, more importantly, by dissimulating their present interconnection position throughout the course of the *Execunet I* litigation.

IV. There Was No Error in Construction of Section 201(a) of the Communications Act

Petitioners attempt to distort the question addressed below into one of whether the court of appeals deprived the telephone industry of a hearing under Section 201 (a) of the Communications Act [50] to determine whether it would be in the public interest to require AT&T to provide interconnections for use with Execunet. In framing the question in this fashion, the petitioners have ignored the fact that the telephone companies have been under a duty, imposed under Section 201, to provide interconnections for MCI ever since *Specialized Carrier*, and that this duty was reaffirmed in *Bell System Tariff Offerings* where the Commission held that "our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services. . . ." [51]

The court of appeals held in *Execunet I* that MCI was authorized to provide Execunet, and this Court denied

[50] 47 U.S.C. § 201(a), AT&T App. 1f.

[51] 46 FCC 2d at 426.

review. Reading *Execunet I* together with the interconnection orders issued by the 1971 and 1974 Commissions, the only reasonable conclusion that can be reached is that MCI has the right to obtain from AT&T the interconnections necessary for the provision of Execunet. Since the court below found that such interconnections had already been ordered by the FCC—with the approval of the Third Circuit—it was unnecessary for it to reach the question of statutory interpretation as to whether there would be an obligation to provide the interconnections in the absence of an agency order to do so.[52]

[52] MCI believes, however, that such an obligation would exist even in the absence of an interconnection order. Section 201(a) of the Communications Act reads as follows (emphasis added):

> *It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor*; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

This section imposes two kinds of interconnection obligations on a common carrier, one requiring no hearing and the other to be imposed only after hearing. The first clause of Section 201(a), which is emphasized above, simply states the normal obligation of a carrier to provide service to all upon reasonable request. When read with Section 202 of the Communications Act, 47 U.S.C. § 202, which prohibits unjust or unreasonable discrimination, the Communications Act requires that a carrier provide service on a nondiscriminatory basis. That is the Act's clear meaning, without any need for construction. It states an obviously sound policy. Congress certainly did not intend that one requesting such service should have to go through a hearing to get it. Rather, he is entitled to service upon reasonable request—subject only to the availability of the facilities needed.

The interconnection facilities for Execunet are simply local business telephone arrangements (or business lines) which give a customer—whether a competing carrier or a local businessman—interconnection access to the local exchange. They are the same interconnections as are supplied by local telephone companies to AT&T Long Lines for its FX service which competes with MCI's Execunet.

V. The Court of Appeals Did Not Usurp The Role of the Administrative Agency

Petitioners' invocation of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 98 S. Ct. 1197 (1978), is an exercise in irrelevance. The decision of the court of appeals here in no way interferes with the FCC's statutory obligation to inquire into the public interest and to implement any findings it makes as a result of such inquiry. Indeed, the decision encourages the agency to do exactly that. In its May 11, 1978 decision denying a stay pending consideration of new petitions for certiorari, the court stated that:[53]

> USITA emphasizes, as did the Commission and AT&T in their suggestions for rehearing *en banc*, that it is the responsibility of the Commission to determine whether competition by services such as Execunet is in the public interest. With that point we are in complete agreement. Recognition of the Commission's public interest responsibilities, however, provides no basis for upholding its February 23 declaratory ruling in view of the clear inconsistencies with the *Execunet* case. For the Commission's declaratory ruling was *not* based on considerations of the public interest, and it in no way reflected a Commission decision that expansion of Execunet service would adversely affect the public interest. Rather, it reflected only the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*. Indeed, it was the Commisison's prohibition of Execunet service without any consideration of the public interest in the first instance which led to this long series of litigation.

The decision of the court of appeals does not decide basic questions of public policy or establish new proce-

[53] AT&T App. 8b-9b.

dural rules. The court has explicitly left all public interest determinations to be made by the agency. The agency is now in the initial stages of a proceeding in which those public interest determinations will be made. *MTS and WATS Market Structure, supra.*[54] All the court

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[54] Congress is also in the process of considering these public interest questions. AT&T has for some time been employing its substantial political influence to gain Congressional aid in its efforts to perpetuate its *de facto* monopoly and eliminate all competition. It succeeded in having proposed legislation introduced to accomplish this objective. S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976); S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). Among other things, AT&T's proposed legislation would prevent MCI and the other specialized carriers from providing even the traditional forms of private line service to which it has long contended they should be limited. Indeed, AT&T's proposed legislation would limit the specialized carriers to services which cannot be provided by AT&T and would make it well nigh impossible for MCI to obtain authorization to do even that much. AT&T's efforts, however, have not been successful. On June 7, 1978, the Chairman and ranking minority member of the Subcommittee on Communications of the House Interstate and Foreign Commerce Committee introduced H.R. 13015, the "Communications Act of 1978." Section 331 thereof provides that:

> In the exercise and performance of its powers and duties under this part, the Commission shall—
>
> (1) place maximum feasible reliance on marketplace forces to achieve the purposes of this part;
>
> (2) promote the maintenance of nationwide basic voice telephone service at affordable rates achieved by regulation (when marketplace forces are deficient) which provides for equitable treatment of all common carriers and by direct assistance where appropriate;
>
> (3) rely on competition to provide efficiency, innovation, and low rates, and to determine the variety, quality, and costs of telecommunications services;
>
> (4) establish full and fair competitive conditions; and
>
> (5) prevent practices which would allow any carrier to limit or exclude competition in the provision of telecommunications services.

This is a ringing declaration that sound public policy requires maximum reliance on competition in telecommunications.

did was to inform the Commission that the public interest determinations necessary for a limitation of MCI's Execunet service had not yet been made and that MCI was therefore authorized to provide Execunet at the present time and had a right to the necessary interconnections from the telephone industry.

CONCLUSION

The Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,
v.
MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

OPINIONS BELOW

The petitions of the United States Independent Telephone Association (USITA), the American Telephone and Telegraph Company (AT&T), and the Federal Communications Commission (the FCC) involve three interrelated opinions of the United States Court of Appeal for the District of Columbia Circuit in *MCI Telecommunications Corp.* v. *FCC*, familiarly called *Execunet*:[1]

1. *Execunet I*, reported at 561 F.2d 365 (D.C. Cir. July 28, 1977), cert. denied, 434 U.S. 1040 (1978) (AT&T App. I, FCC App. B),[2] reversing a decision of the FCC in *MCI Telecommunications Corp.*, Docket No. 20640, reported at 60 F.C.C.2d 25 (1976);

2. *Execunet II*, not yet officially reported (D.C.Cir. April 14, 1978) (AT&T App. A, FCC App. A), directing compliance with the *Execunet I* mandate of the Court of Appeals; and

3. *Execunet III*, not yet officially reported (D.C.Cir. May 11, 1978) (AT&T App. B, FCC App. E), granting in part and denying in part motions for stay pending certiorari, applications for stay denied by this Court in Nos. A-954 and A-966, not reported (May 22, 1978).

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[1] *MCI Telecommunications Corp. (Execunet)*, Docket No. 20640, 60 F.C.C.2d 25 (1976), reversed, *MCI Telecommunications Corp.* v. *FCC (Execunet I)*, 561 F.2d 365 (D.C. Cir. July 28, 1977), cert. denied, *United States Independent Telephone Assn.* v. *MCI Telecommunications Corp.*, 434 U.S. 1040 (1978), order directing compliance with mandate *(Execunet II)*, —— F.2d —— (D.C. Cir. Apr. 14, 1978), petitions for rehearing and suggestions for rehearing en banc denied (D.C. Cir. May 8, 1978), motion for stay pending cert. denied, motion for temporary stay pending application to Chief Justice granted *(Execunet III)*, —— F.2d —— (D.C. Cir. May 11, 1978), applications for stay denied, Nos. A-954 and A-966 (U.S. May 22, 1978).

[2] "AT&T App." refers to the appendix of petitioner AT&T in Case No. 78-217, adopted by petitioner USITA in Case No. 78-216. "FCC App." refers to the appendix of the FCC in Case No. 78-270.

JURISDICTION

Petitioners seek review of the opinion and order of the Court of Appeals in *Execunet II* entered April 14, 1978 (AT&T App. A, FCC App. A). Timely petitions for rehearing and suggestions for rehearing en banc were denied by the Court of Appeals on May 8, 1978 (AT&T App. E, FCC App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Court of Appeals earlier ruled in *Execunet I* that MCI was authorized without further FCC proceedings to provide to the public a communications service called "Execunet", which required interconnection with AT&T's monopoly local exchange facilities for users to have access to the Execunet circuits. After judicial review had been exhausted, the FCC approved a change of position by AT&T whereby it refused to furnish any further interconnection of its essential monopoly facilities. Under these circumstances, did the Court of Appeals properly rule in *Execunet II* that this action constituted a violation of its mandate, because it frustrated and nullified its *Execunet I* decision by precluding MCI as a practical matter from providing the authorized service to the public?

STATUTE INVOLVED

Sections 201(a) and 214(a) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. 201(a), 214 (a) and (c), provide in pertinent part:

> Sec. 201(a). It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for

hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Sec. 214(a). No carrier shall undertake the construction of a new line or any extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.

(c) The Commission shall have power to issue such certificate as applied for, or refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

The FCC granted the first applications of Microwave Communications, Inc. (MCI) to construct microwave facilities to provide specialized communications services in 1969.[3] The FCC recognized at that time that MCI's ability to market its service would be dependent on the

[3] *Microwave Communications, Inc.*, Docket No. 16509, 18 F.C.C.2d 953 (1963), recon. denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

ability of its subscribers to secure local loop service from the telephone companies serving the area, and agreed with the hearing examiner that the "intransigence" of the established carriers was a likely obstacle to essential interconnection.[4] "We have already concluded," the FCC declared, "that a grant of MCI's proposal is in the public interest. We likewise conclude that, absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest." [5]

Following MCI's grant, numerous applications were filed by MCI and its affiliated companies, by Southern Pacific Communications Company (SPCC), and by others, to construct microwave facilities to provide specialized communications services in various parts of the country. After an extensive rule making proceeding in *Specialized Common Carrier Services*,[6] the FCC concluded that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.[7] The FCC also reaffirmed the view expressed in its notice of inquiry that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions, and that "where a carrier has monopoly control over essential facilities we will not condone any policy or practice

[4] Id., 18 F.C.C.2d at 965, 1007.

[5] Id., 18 F.C.C.2d at 965, 21 F.C.C.2d at 193.

[6] *Specialized Common Carrier Services*, Docket No. 18920, notice of inquiry, 24 F.C.C.2d 318 (1970), first report and order, 29 F.C.C.2d 870 (1971), recon. denied, 31 F.C.C.2d 1106 (1971), affirmed, *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975).

[7] Id., 29 F.C.C.2d at 920.

whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." [8]

Thereafter, complaints were filed by specialized carriers that they were unable to secure prompt, adequate, and efficient interconnection of local facilities from AT&T and the Associated Bell System Companies (collectively Bell).[9] A controversy also arose whether Bell was required to furnish interconnection of its monopoly local distribution facilities for all of the specialized carriers' authorized services, including foreign exchange (FX) service and common control switching arrangements (CCSA), which used local exchange facilities providing access to the switched public telephone network. Following proceedings on an order to Bell to show cause, the FCC held in *Bell System Tariff Offerings*:[10] (1) that Bell had been afforded "ample 'opportunity for hearing' to meet the requirements of Section 201(a)" of the Communications Act to support the FCC's interconnection orders;[11] (2) that the FCC's prior orders in *MCI* and *Specialized Carrier Services* covered interconnection of the broad range of services which the specialized carriers were authorized to provide, including FX and CCSA type services;[12] and (3) that Bell had engaged in conduct and practices resulting in denying or unreasonably delaying interconnection with authorized specialized carrier services in violation of the Communications Act and the FCC's declared policy.[13]

[8] Id., 24 F.C.C.2d at 347, 29 F.C.C.2d at 940.

[9] See *AT&T Offer of Facilities for Use by Other Common Carriers*, Docket No. 20099, 52 F.C.C.2d 727 (1975).

[10] *Bell System Tariff Offerings*, Docket No. 19896, order to show cause, 44 F.C.C.2d 245 (1973), decision, 36 F.C.C.2d 413 (1974), affirmed, *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), (AT&T App. G), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

[11] Id., 46 F.C.C.2d at 417-30.

[12] Id., 46 F.C.C.2d at 419-28.

Bell was ordered to furnish to the specialized carriers "the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services," including FX and CCSA.[14] On review, the Third Circuit affirmed in all particulars,[15] holding that the order was not overbroad in its context in precluding AT&T from discriminating in treating its Long Lines Department and its affiliates differently from specialized carriers.[16]

Under tariff revisions which became effective in October, 1974, MCI began to offer a new metered use service over its authorized facilities which it called "Execunet". AT&T complained to the FCC that MCI was offering ordinary long distance telephone service (called Message Telecommunications Service, or MTS), but was only authorized to provide private line service. The FCC agreed,[17] rejecting the Execunet tariff as unlawful because it had intended in *Specialized Common Carrier Services* to open only private line services to competition by specialized carriers,[18] and because Execunet had characteristics similar to MTS and not to any actual private line service such as FX being offered by any carrier.[19] The essential difference perceived between FX (which was classified as a private line service) and Execunet was that in FX service, one end of MCI's facilities was interconnected

[13] Id., 46 F.C.C.2d at 435-36.

[14] Id., 46 F.C.C.2d at 438.

[15] Id., 503 F.2d 1250 (3rd Cir. 1974), AT&T App. G.

[16] Id., 503 F.2d at 1273, AT&T App. G at 42g.

[17] Note 1 supra, 60 F.C.C.2d 25 (1976).

[18] Id., 60 F.C.C.2d at 36.

[19] Id., 60 F.C.C.2d at 42.

with AT&T's monopoly local exchange facilities in the cities served by MCI's circuits, whereas in Execunet both ends of MCI's facilities were so interconnected.[20]

In a unanimous decision in *Execunet I*, the District of Columbia Circuit reversed.[21] The Court of Appeals rejected the FCC's position that implicit restrictions had been imposed on the facilities authorized to specialized carriers which limited them to providing only "private line" services.[22] The Court of Appeals held that since the FCC had never made an affirmative determination under Section 214(c) of the Communications Act that the public convenience and necessity required that limitations be attached to MCI's authorized facilities, there were no restrictions on the services which might be provided and the FCC could not properly reject the Execunet tariff as offering an unauthorized service.[23] In addition, the Court of Appeals held that unless and until there had been a public interest determination in an appropriate proceeding, there was no present justification for continuing or propagating a de facto or de jure monopoly by AT&T over interstate communications.[24]

This Court denied petitions for certiorari of *Execunet I* on January 16, 1978.[25] On the same day, AT&T announced that it would provide no further interconnection of its monopoly local exchange facilities essential for specialized carriers to furnish authorized Execunet-type

[20] Ibid.

[21] Id., 561 F.2d 365 (D.C. Cir. 1977), AT&T App. I, FCC App. B.

[22] Id., 561 F.2d at 373-77, AT&T App. I at 15i-23i, FCC App. B at 16B-26B.

[23] Id., 561 F.2d at 377-80, AT&T App. I at 23i-30i, FCC App. B at 26B-33B.

[24] Id., 561 F.2d at 379-80, AT&T App. I at 29i-30i, FCC App. B at 31B-33B.

[25] Id., 434 U.S. 1040 (1978).

services to the public, and petitioned the FCC for a declaratory ruling that it was under no obligation to do so. The Department of Justice immediately recognized that the petition was prompted by AT&T's "hope that the Commission would provide the protection from competition which the courts consistently refused to grant to AT&T," and urged that AT&T "cannot be allowed to frustrate MCI's efforts to provide enhanced intercity service by denying access to such local distribution loops."[26]

The FCC granted the ruling requested by AT&T on an expedited basis, holding that *Execunet I* applied only to defining the services authorized under Section 214 of the Act, not to any obligation of AT&T under Section 201(a) of the Act to provide interconnection to enable the carriers to provide their authorized services to the public, and that its own earlier rulings were limited to requiring AT&T to interconnect private line services and did not extend to Execunet-type services.[27] At the same time, the FCC rejected summarily without hearing an Execunet-type offering of SPCC called SPRINT Option V as "a substantive nullity," on the ground that as a practical matter SPCC could not provide this admittedly authorized service to the public because SPCC did not have available the necessary interconnection with AT&T's monopoly local exchange facilities.[28] In both summary rulings, the FCC acknowledged that the issues in determining whether interconnection should be ordered under Section 201(a) of the Act were "essentially identical" to the issues in determining whether limitations should

[26] Comments of the United States Department of Justice, *Bell System Tariff Offerings*, Jan. 30, 1978, at 2-3.

[27] *Petition of AT&T for a Declaratory Ruling and Expedited Relief*, FCC 78-142 (released Feb. 28, 1978), AT&T App. C, FCC App. C.

[28] *Southern Pacific Communications Co., Revisions to Tariff F.C.C. No. 6*, FCC 78-143 (released Feb. 28, 1978).

be imposed on the authorized services of specialized carriers under Section 214(c) of the Act.[29]

On motion by MCI, the Court of Appeals issued an order and opinion in *Execunet II*[30] here under review holding that the Commission's declaratory ruling violated its mandate in *Execunet I*. The Court of Appeals held that its prior decision did clearly contemplate that AT&T was required to provide interconnection for Execunet service, since interconnection was admittedly essential to MCI's ability to offer the service; AT&T had previously interconnected its facilities without objection or question; and AT&T had represented that if *Execunet I* became effective, the decision in and of itself would necessarily lead to vigorous and adverse competition.[31] The Court declared that the FCC's construction was "plainly inconsistent", in "indirect and explicit contradiction", and "wholly at odds" with its decision, and that it "twists the issues * * * beyond recognition" and "deliberately frustrates" the purpose, basis, and intended effect of *Execunet I*, contrary to the expansive interpretation required by earlier decisions.[32] The Court further held that the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania*[33] provided strong support, not conflicting authority, for a broad construction requiring Execunet-type interconnection, since Execunet required virtually the same form of interconnection as provided for FX service, and admittedly AT&T was under an obligation to

[29] Note 27 supra, FCC 78-142 at ¶ 61, AT&T App. C at 36c-37c, FCC App. C at 41c-42c; note 28 supra, FCC 78-143 at ¶ 28.

[30] Note 1 supra, *Execunet II*, AT&T App. A, FCC App. A.

[31] Id., AT&T App. A at 9a-10a, FCC App. A at 12A-13A.

[32] Id., AT&T App. A at 11a, 13a, 15a, FCC App. A at 14A, 16A, 18A.

[33] Note 9 supra, 503 F.2d 1250 (3rd Cir. 1974), AT&T App. G.

interconnect with services beyond those traditionally considered "private line."[34]

Petitions for rehearing of *Execunet II* and suggestions for rehearing en banc were denied by the Court of Appeals without any judge requesting that a vote be taken on en banc consideration.[35] The Court of Appeals also denied a motion for stay pending petitions for certiorari, but granted a temporary stay to permit applications to the Circuit Justice for a stay, while issuing another opinion *(Execunet III)* on the issues and the reasons why it believed the arguments raised once again to be wholly without merit.[36] Applications for a stay pending certiorari were denied by this Court.[37]

Petitions for certiorari have been filed by USITA, AT&T, and the FCC, with Commissioner Fogarty issuing a statement (Appendix A attached to this brief) dissenting to the FCC's decision to seek certiorari.

[34] Note 1 supra, *Execunet II*, AT&T App. A at 19a-22a, FCC App. A at 22A-24A.

[35] Note 1 supra (D.C. Cir. May 8, 1978), AT&T App. E, FCC App. D.

[36] Note 1 supra (D.C. Cir. May 11, 1978), AT&T App. B, FCC App. E.

[37] Note 1 supra, Application Nos. A-954, A-966 (U.S. May 22, 1978).

ARGUMENT

1. The Court of Appeals properly held that the refusal to provide further interconnection violated its mandate in *Execunet I*. In *Execunet I*, the Court of Appeals held that specialized carriers are authorized to provide Execunet-type services without limitation over their authorized lines in competition with AT&T's interstate services, and that there is no present justification for preserving to AT&T a de facto or de jure monopoly in communications. As a necessary part of its mandate, the decision clearly contemplated that AT&T would continue to interconnect its monopoly local exchange facilities essential to the carriers' ability to furnish the authoried services to the public.

In describing Execunet, the Court of Appeals adverted to "local exchange telephone service" at both terminals as a necessary part of the service.[38] "Strikingly absent" from the list of procedures to challenge the availability of specialized carrier service offerings was not only any mention of further Section 214 proceedings,[39] but also of Section 201(a) proceedings.[40] The Court below explicitly recognized that under the statutory scheme, a carrier "should in general be free to initiate and *implement* new rates or services over existing communications lines", absent a prior adverse determination (emphasis in original).[41]

Likewise, throughout the *Execunet I* proceedings AT&T freely provided interconnection to MCI without protest, objection, or suggestion that it was not required to do so. Indeed in pleadings to the Court below and to this Court,

[38] Note 1 supra, 561 F.2d at 367 fn. 3, AT&T App. I at 2 fn. 3.

[39] Id., 561 F.2d at 379, AT&T App. I at 27i-28i.

[40] See ibid.

[41] Id., 561 F.2d at 374, AT&T App. I at 18i.

AT&T represented that *Execunet I* would lead to vigorous and adverse competition without any indication that it would seek to thwart this result by interposing a refusal to interconnect.[42] A party may not reserve for another round of litigation a point which could and should have been raised during pendency of an action to reverse a Commission order, by remaining silent on the issue until certiorari has been denied.[43]

The Court of Appeals recognized that the FCC ruling that AT&T is under no obligation to furnish further interconnection "deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree."[44] The FCC itself acknowledged in the contemporaneous rejection of SPRINT Option V, an SPCC Execunet-type service, that the effect of its ruling was to make *Execunet I* a "substantive nullity" by making it impossible for the carrier as a practical matter to furnish its authorized service.[45] AT&T and the FCC thus sought to leave the specialized carriers with Court-affirmed authorizations to provide Execunet-type services over their authorized facilities, but without the means to offer these services to the public.

In the exercise of its jurisdiction to interpret and enforce its own orders, the Court of Appeals issued its order under review directing compliance with its mandate because the FCC's analysis and decision were "plain-

[42] Id., *Execunet II*, AT&T App. A at 9a-10a, FCC App. A at 12A-13A; *Execunet III*, AT&T App. B at 6b, FCC App. E at 6E-7E.

[43] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958); *Colorado River Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

[44] Note 1 supra, *Execunet II*, AT&T App. A at 15a, FCC App. A at 18A.

[45] Note 28 supra.

ly inconsistent with" [46] and "in direct and explicit contradiction to" [47] the Court's analysis and ruling in *Execunet I*: (1) the FCC's position that the *Specialized Carrier* decision excluded Execunet-type services from consideration was in explicit contradiction to the holding in *Execunet I*; [48] (2) the FCC's narrow interpretation was directly at odds with the broad interpretation in *Execunet I* that specialized carriers were authorized to enter the market and compete with AT&T, subject only to any possible later limitations based on public interest determinations;[49] and (3) *Execunet I* was wholly consistent with and supported by the Third Circuit decision in *Bell Telephone Co. of Pennsylvania.*[50] An administrative agency, like a trial court, is "without power to do anything which is contrary to either the letter or the spirit of the mandate" of an appellate court of higher authority, and "the higher tribunal is amply armed to rectify any deviation" from its binding decision.[51]

It is clear from the tenor of the petitions for certiorari that the quarrel of petitioners is essentially with the decision of the Court of Appeals in *Execunet I* holding

[46] Note 1 supra, *Execunet II*, AT&T App. A at 11a, FCC App. A at 14A.

[47] Id., *Execunet II*, AT&T App. A at 13a, FCC App. A at 16A; *Execunet III*, AT&T App. B at 5b, FCC App. E at 5E.

[48] Id., *Execunet II*, AT&T App. A at 13a, FCC App. A at 16A; *Execunet III*, AT&T App. B at 4b-5b, FCC App. E at 5E.

[49] Id., *Execunet II*, AT&T App. A at 13a-15a, FCC App. A at 16A-18A; *Execunet III*, AT&T App. B at 5b, FCC App. E at 5E.

[50] Id., *Execunet II*, AT&T App. A at 15a-20a, FCC App. A at 18A-24A; *Execunet III*, AT&T App. B at 5b-8b, FCC App. E at 5E-9E.

[51] *City of Cleveland, Ohio* v. *FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Yablonski* v. *UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), cert. denied, 406 U.S. 906 (1972); *Thornton* v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

Execunet was an authorized service.[52] Certiorari having been denied, however, the final judgment of the Court of Appeals was effective and binding,[53] and the FCC was bound to act upon the Court's corrections of its errors of law,[54] giving full effect to its duties in harmony with the views expressed by the Court.[55] What the FCC sought to do upon remand was not to enforce the legislative policy committed to its charge [56] consistent with the Court's mandate. Instead, as the Court below pointed out, the FCC's declaratory ruling was not based on considerations of the public interest, but rather reflected only the FCC's interpretation of statutory provisions of the Communications Act and earlier decisions of the FCC, the Third Circuit, and *Execunet I* directly inconsistent with the Court's judicial interpretation.[57] Thus the Court did not seek as in *Vermont Yankee* to impose its own notions of proper procedures beyond rules governing the agency because it was "unhappy with the result reached," [58] but to the contrary interdicted an action by

[52] E.g., "The court of appeals continues in this case to make and implement important communications policy. * * * *Execunet I* * * * drastically expanded the FCC's competition policy to include services the FCC had not intended to embrace in its policy." (FCC Pet. 5.) "[I]n its trio of *Execunet* decisions the court below has seriously misread the statutes involved, has usurped the Commission's authority * * *, and has precluded responsible exercise of that authority by the agency * * *" (USITA Pet. 9.)

[53] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

[54] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

[55] *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200 (1947); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 278 (1933).

[56] Note 54 supra, 309 U.S. at 145.

[57] Note 1 supra, *Execunet III*, AT&T App. B at 8b-9b, FCC App. E at 9E-10E.

[58] *Vermont Yankee Nuclear Power Corp.*, v. *National Resources Defense Council, Inc.*, 98 S.Ct. 1197, 1219 (1978).

the FCC which it found "deliberately frustrates * * * the intended effect" of the Court's decree [59] by attempting to circumvent the Court's statutory construction because it was dissatisfied with the Court's conclusions.[60]

2. The decision below is not in conflict with the decision of the Third Circuit. The decision of the Court below under review is only one of a series of recent cases, including *Bell Telephone Co. of Pennsylvania*,[61] upholding the *extension* of competition by new entrants in services and facilities heretofore offered only by the telephone companies, and *affirming* the obligation of telephone companies to furnish interconnection of their monopoly local exchange facilities essential for the provision of the services and facilities by the new competitors.[62]

On three occasions the Court below has considered and rejected the arguments of petitioners that its *Execunet* decisions are somehow in conflict with the decision of the Third Circuit in *Bell Telephone Co. of Pennsylvania*, and to the contrary concluded that the Third Circuit decision affirmatively supports the rulings of the District of Columbia Circuit.[63] Drawing upon the consistent earlier rulings of the FCC that established carriers with ex-

[59] Note 1 supra, *Execunet II*, AT&T App. A at 15a, FCC App. A at 18A.

[60] Cf. *AT&T* v. *FCC*, 487 F.2d 864, 880, 881 (2d Cir. 1973).

[61] Note 9 supra.

[62] *Washington Utilities & Transportation Commission* v. *FCC*, note 6 supra; *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 797 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977); *Bell Telephone Co. of Pennsylvania* v. *FCC*, note 9 supra; *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *People of State of California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

[63] Note 1 supra, *Execunet I*, 561 F.2d at 377-78 fn. 59, AT&T App. I at 24i-25i fn. 59, FCC App. B at 26B-27B fn. 59; *Execunet II*, AT&T App. A at 15a-20a, FCC App. A at 18A-24A; *Execunet III*, AT&T App. B at 7b-8b, FCC App. E at 7E-9E.

change facilities should upon request permit interconnection on reasonable terms and conditions, and that "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carriers would discriminate in favor of an affiliated carrier or show favoritism among competitors," [64] the Third Circuit affirmed the FCC's ruling that its "prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide." [65] *Execunet II* and *Execunet III* point out that the Third Circuit's decision buttresses the District of Columbia Circuit's own views, because the interconnection required in *Bell Telephone Co. of Pennsylvania* for FX and CCSA was for facilities virtually identical to that required for Execunet;[66] there was no explicit mention of FX or CCSA, just as there was no reference to Execunet services, in the earlier decisions;[67] and the authorizations encompassed by the FCC's prior decisions extended not only to new and innovative services but also to services in direct competition with those offered by AT&T.[68]

The argument of petitioners that *Execunet II* is in conflict with the Third Circuit opinion hinges on language in *Bell Telephone Co. of Pennsylvania* that AT&T's obligation to interconnect was not unbounded because it read the FCC order to require AT&T to provide to the special-

[64] Note 9 supra, 503 F.2d at 1254-59, AT&T App. G at 3g-12g.

[65] Id., 503 F.2d at 1259, AT&T App. G at 12g, affirming 46 F.C.C.2d at 426-27.

[66] Note 1 supra, *Execunet II*, AT&T App. A at 19a, FCC App. A at 23A; *Execunet III*, AT&T App. B at 7b, FCC App. E at 8E.

[67] Id., *Execunet II*, AT&T App. A at 17a, FCC App. A at 21A; *Execunet III*, AT&T App. B at 7b, FCC App. E at 8E.

[68] Id., *Execunet II*, AT&T App. A at 17a-18a fn. 31, FCC App. A at 21A fn. 31; *Execunet III*, AT&T App. B at 8b, FCC App. E at 9E. Cf. *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

ized carriers "those (interconnection) elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." [69] However, as the Court below carefully pointed out, the Third Circuit was concerned not with uncertainty as to the services the specialized carriers themselves would provide, but with the types of services AT&T might be required to provide "hereafter"—an irrelevant consideration in this case, since the forms of interconnection for FX and Execunet are virtually identical.[70] Furthermore, the FCC itself recognized that the term "private line services" was only a shorthand or abbreviated expression encompassing a broader range of services beyond those traditionally considered private line.[71] The obligation of AT&T to interconnect ran to all of the specialized carriers' authorized services, and under the *Specialized Carrier* decision as interpreted in *Execunet I* this included Execunet-type services.[72]

The Third Circuit decision in *Bell Telephone Co. of Pennsylvania* also settled the issue sought to be revived by petitioners (AT&T Pet. 12; FCC Pet. 3) that an evidentiary hearing was required before interconnection could be mandated. Following the principle established by this Court in *Allegheny-Ludlum* [73] and *Florida East*

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[69] Note 9 supra, 503 F.2d at 1273-74, AT&T App. G at 42g.

[70] Note 1 supra, *Execunet II*, AT&T App. A at 19a, FCC App. A at 22A-23A.

[71] Id., *Execunet II*, AT&T App. A at 19a-20a, FCC App. A at 23A; *Execunet III*, AT&T App. B at 8b, FCC App. E at 9E, citing *Petition of AT&T for a Declaratory Ruling and Expedited Relief*, FCC 78-142 ¶ 59, AT&T App. C at 34c-35c, FCC App. C at 39c-40c.

[72] Note 1 supra, *Execunet I*, 561 F.2d at 379, 380, AT&T App. I at 28i, 30i, FCC App. B at 31B, 32B.

[73] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

Coast Ry.,[74] the Third Circuit held that the statutory requirement of "an opportunity for hearing", absent reference to "a hearing on the record", was satisfied by less formal and adversarial procedures appropriate to establishing a general policy requiring AT&T to interconnect its monopoly local exchange facilities to all the authorized services of the specialized carriers.[75]

3. Review by this Court would be premature. As the Court below has pointed out, no justification has been established for allowing AT&T to maintain its de facto monopoly over interstate communications, or for preventing the specialized carriers from exercising their right established by relevant agency and judicial precedents to enter the specialized communications market now.[76] The FCC has conceded that the public interest issues to be resolved in determining whether AT&T must interconnect Execunet-type services are "essentially identical" to the public interest issues in determining whether specialized carriers should be authorized to provide Execunet-type services.[77] The FCC has embarked upon a comprehensive rule making proceeding to examine precisely those broad issues of competition and the public interest raised by the introduction of services such as Execunet.[78] Until the FCC has had an opportunity to make an informed decision whether competition should be circumscribed under public interest standards, based upon a specific factual record and not upon unsupported assumptions and vague suppositions, there is no adequate

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[74] *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

[75] Note 9 supra, 503 F.2d at 1263-68, AT&T App. G at 22g-32g.

[76] Note 1 supra, *Execunet III*, AT&T App. B at 8b-9b, FCC App. E at 9E-10E.

[77] Note 29 supra.

[78] *MTS and WATS Market Structure*, FCC 78-144 (1978).

foundation for restricting specialized carriers from furnishing presently authorized services or for review by this Court of a priori limitations which petitioners seek to impose.

While the petitions for certiorari turn on the asserted differences betwen "private line" services and ordinary switched public telephone services, it has been recognized by representatives of the telephone industry itself that the distinction has become increasingly ephemeral: [79]

> Although the FCC has subsequently [after the *Specialized Carrier* decision] attempted to more closely define the services open to competition, it has become apparent that no clear distinction can be made between the competitive "private line service" and monopoly Message Telecommunications Service market. In economic terms, the two types of services are strong substitutes for one another, especially for large volume business users who constitute a significant portion of the Message Telecommunications Service market. In technological terms, too, the distinction between "private line service" and "Message Telecommunications Service" is rapidly dissipating.

Current hearings on a bill to rewrite completely the provisions under which telecommunications is regulated by Federal statute [80] disclose a strong tide in favor of competition in all aspects of interstate communications. The bill itself is designed, in the provision of domestic common carrier service, to place maximum feasible reliance on market place forces; to promote nationwide basic voice telephone service at affordable rates; to rely on competition to provide efficiency, innovation, and low rates,

[79] *The Dilemma of Telecommunications Policy, An Inquiry into the State of Domestic Telecommunications by a Telecommunications Industry Task Force*, at III 6-7 (1967). Cf. Statement of Commissioner Washburn in *MTS and WATS Market Structure*, note 77 supra.

[80] H.R. 13015, 95th Cong., 2d Sess. (1978).

and to determine the variety, quality, and cost of telecommunications services; to establish full and fair competitive conditions; and to prevent practices by any carrier to limit or exclude competition.[81] The Chairman of the FCC has emphasized the importance and his support for this "clear Congressional mandate that competition in telecommunications should be the rule and monopoly the exception." [82]

There are no special or important reasons for review by this Court on a writ of certiorari of the question presented whether the Court of Appeals correctly interpreted its own opinion in directing compliance with its mandate. Conversely, the specialized carriers should not be deprived of their present opportunity afforded them under existing authorizations to offer services to the public which the Court of Appeals has ruled to be permissible, after its judgment became final and effective upon the denial of certiorari.

[81] Id., Sec. 331.

[82] Statement of Charles D. Ferris, Chairman, Federal Communications Commission, on the International and Domestic Common Carrier Provisions of H.R. 13015, before the Subcommittee on Communications of the House Committee on Interstate & Foreign Commerce (Aug. 9, 1978) at 2-3.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

6065

August 10, 1978—CC

COMMISSIONER FOGARTY DISSENTS TO SEEKING SUPREME COURT REVIEW OF *MCI TELECOMMUNICATIONS CORP.* V. *FCC*

Commissioner Joseph R. Fogarty today issued the following statement regarding the Commission's decision to seek Supreme Court review of *MCI Telecommunications Corporation* v. *FCC*, FCC 76-1635 (D.C. Circuit 1978):

The Commission has decided to seek certiorari of the Court of Appeals decision granting MCI's Motion to Enforce Mandate. The court in that decision reversed the Commission's determination that the telephone companies are not obligated to provide MCI with local exchange facilities to use in connection with Execunet service, a decision to which I dissented. I dissented also to the determination to seek rehearing before the Court of Appeals *en banc*, and I disagreed with the decision to ask the Supreme Court for a stay. Subsequently, both the Court of Appeals and the Supreme Court rejected the Commission's requests.

Nevertheless, the Commission refuses to accept this decision and seeks, without sound basis, in my opinion, to obtain Supreme Court review. For that reason, I dissent to the decision to seek certiorari. Since my reasons for dissent are the same as those I set forth in opposing rehearing, I am attaching the statement which I issued at that time.

—FCC—

Attachment

STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Motion for Stay of the United States Court of Appeals Order Directing Compliance With *Execunet* Mandate.

The Commission has filed a motion for stay and said it will seek rehearing before the United States Court of Appeals for the District of Columbia *en banc*, of the Court's April 14, 1978,[1] grant of MCI Telecommunications Corporation's Motion for an Order Directing Compliance with Mandate in the Court's *Execunet* decision.[2] I believe it is improper and counterproductive to continue this litigation any further, following two reversals by the Court of Appeals and denial of review by the Supreme Court. Enough is enough. I would devote all available resources of this Commission now to expedite determination of a reasonable competitive market structure for domestic telecommunications services. Rehearing is being sought of an Order which, in essence, requires the FCC to direct and the telephone companies to furnish those interconnections and local facilities required for the provision of MCI's *Execunet* service offering.[3] In doing so, the Court also found that its

[1] MCI Telecommunications Corp. v. FCC, —— F.2d ——, No. 75-1635.

[2] MCI Telecommunications Corp. v. FCC, 561 F.2d 365, (D.C. Cir., 1977), cert. denied, —— U.S. ——, 46 U.S.L.W. 3446 (Jan. 16, 1978).

[3] "Execunet's characteristics are summarized as follows. A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute

prior *Execunet* decision[4] required such interconnections, despite a declaratory ruling by the Commission, to which I dissented, that such interconnections were not mandated by Section 201(a) of the Communications Act, 47 U.S.C. § 201(a).[5]

In Order to understand the import of the April 14 decision, it is necessary to examine briefly the legal basis of our competitive service policy. Our 1971 *Specialized Common Carrier* decision[6] declared that it is the Commission's policy to promote "full and fair competition" among established and new "specialized" carriers for the provision of "specialized common carrier services." That decision cleared the way for the grant of a number of facilities applications to several newly emerging common carriers, including MCI. Both in that case and in the subsequent *Bell System Tariff Offerings*,[7] we determined that the specialized carriers were limited to the offering of specialized, particularly private line, services.[8]

AT&T subsequently refused to supply interconnections for the offering of foreign exchange (FX) and common

toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand." MCI Telecommunications Corp. 60 FCC 2d 25, 26n (1976).

[4] *Supra*, note 2.

[5] —— F.2d ——, FCC 78-142, released February 28, 1978.

[6] 20 FCC 2d 870 (1971), aff'd sub nom Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (2d Cir. 1975), cert. denied, 423 U.S. 836 (1975).

[7] 46 FCC 2d 413 (1974), aff'd sub nom Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir., 1974), cert. denied, 422 U.S. 1026 (1975).

[8] See MCI Telecommunications Corp., 60 FCC 2d 25, 36 (1976).

control switching arrangement services (CCSA). Upon complaint, we hold that FX and CCSA were authorized private line services and that the *Specialized Carrier* decision, *supra*, could reasonably be read to grant those interconnections, pursuant to Section 201(a) of the Act, "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services." [9]

AT&T appealed the Commission's interconnection order, asserting among other arguments that our opinion was "somewhat vague and, to a certain extent, overbroad." [10] The Third Circuit affirmed the Commission, however, holding that, when read in the context of the *Specialized Common Carrier* decision, our intention had been for interconnection to be required only in connection with the offering of specialized common carrier services. "Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear." [11]

When MCI began offering its Execunet tariff, AT&T did not refuse to provide interconnections, but rather filed a complaint seeking a ruling that the service was outside of those which MCI's authorizations allowed it to offer. After hearing, we agreed and ruled the MCI tariff to be null and void.[12] We found Execunet to be not private line but essentially long distance message telecommunications service (MTS) and outside of the

[9] Bell System Tariff Offerings, *supra* note 7, 46 FCC 2d at 438.

[10] *Supra*, note 7, 503 F.2d at 1273.

[11] *Id.*

[12] MCI Telecommunications Corp., 60 FCC 2d 25 (1976), rev'd sub nom MCI Telecommunications Corp. v. FCC, *supra*, note 2.

scope of those services which the specialized carriers were permitted to provide.

Our holding in this regard was overturned in the first of the court reversals relating to this question. The Court of Appeals told us that the *Specialized Common Carrier* decision did not limit services which MCI could offer, but rather such limitations could be imposed only after public interest findings were made based upon a complete record. In developing such a record, the Court cautioned, "the Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake." [13]

Significantly, it was not until *after* denial of review by the Supreme Court that AT&T refused to provide interconnections. The Commission agreed that 201(a) did not require the furnishing of local facilities to MCI when it granted AT&T's declaratory ruling petition. In dissenting from that ruling, I wrote, "Clearly, the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for the provision of [Execunet]. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated interconnections necessary for services authorized therein, and the *Execunet* court found these services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection."

Now we are faced with what amounts to a Court of Appeals reversal of the declaratory ruling, with a direction to the Commission to comply with the Court's *Execunet* mandate. Yet the Commission still insists on retrying the *Execunet* case, this time by seeking a stay and rehearing. It persists in this effort despite language in the April 14 Court Order, which I find very disturb-

[13] 561 F.2d at 380.

ing, that the Commission's Declaratory Ruling "twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of this litigation, the basis on which it was presented by the parties, and the intended effect of our decree." [14] The Court also cites AT&T's efforts to thwart the development of MCI's services, then says that now "we are faced with a new effort by AT&T, with the approval of the Commission, to arrest development of Execunet service."[15]

Whiie I am certain that my colleagues believe that a rehearing request has a reasonable chance of success, I cannot agree. Instead, the attempt to relitigate these same issues on which we were reversed in *Execunet* will further alienate a Court which already has expressed the view that this Commission is acting "in direct and explicit contradiction to our *Execunet* decision." [16]

The FCC has accepted losses before—without devastating consequences. Certainly, it has had a multitude of court reversals in the cable and broadcast areas. It is time now for a mature Commission to accept the *Execunet* decisions and to move ahead affirmatively to define and resolve the issues in CC Docket No. 78-72, our MTS/WATS market structure investigation, and thus to remove as quickly as possible the uncertainties surrounding the scope of inter-city competition.

Meanwhile, we are under a Court direction to enforce the *Execunet* mandate. In doing so, I would ensure that AT&T complies by issuing a show cause order in the event it does not provide MCI with local interconnections and facilities necessary for the provision of Execunet service within a reasonable time at just and reasonable rates.

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[14] Slip opinion, pp. 15-16.

[15] Slip opinion, p. 3.

[16] Slip opinion, p. 14.

No. 78-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF PETITIONER

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REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), Petitioner in No. 78-216,[1] hereby respectfully submits its reply to the September 26, 1978 Briefs in Opposition filed by MCI Telecommunications Corporation, *et al.*, (MCI) and by Southern Pacific Communications Company (SPCC).

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[1] As noted in our petition, USITA, as the national trade association of the Nation's approximately 1,600 Independent (non-Bell) telephone companies, appears here in the interest of these companies in the furnishing of local and long distance telephone service.

I. PRELIMINARY STATEMENT AND SUMMARY.

While these briefs ignore the substantial interest of USITA and its members in this case—perhaps understandably in view of the presence here of a larger target (AT&T)—of far greater decisional significance is that neither brief comes to grips with the basic and critical fact that there are now at least two new long distance telephone companies in these United States (MCI and SPCC) not because the Federal Communications Commission (FCC) found that telephone service was so inadequate or that telephone rates were so high that the public interest required new, additional, or better long distance telephone service, but simply because the court below ordered it.

As MCI's recent full page advertisement (*Industry Week,* September 18, 1978, p. 128) tells the story—

> "Decision of the Federal Government allows MCI to offer low cost long distance telephone service . . . . Long distance calls cost less when you use MCI with Bell . . . we're part of the telephone system."

Although MCI's advertisement does not specify which branch of the Federal Government made the decision, if one thing is clear in this case, it is the fact that it is the court below—not FCC—that has decided that MCI should be allowed to offer telephone service. And it is the court below—not FCC—that has found MCI to be "part of the telephone system", by requiring existing telephone companies (Bell and Independent) to connect their local exchanges to MCI and other "specialized carrier" facilities in order that long distance customers of the existing companies may become customers of MCI or SPCC for long distance telephone

service. In so doing, the court below has far overstepped the bounds of judicial review and improperly intruded into the agency's decision making process.[2]

II. THE FCC HAS NOT ALLOWED MCI TO OFFER LONG DISTANCE TELEPHONE SERVICE.

The FCC orders in this case below, its petition to the Court in *Execunet I,* its pending petition (No. 78-270), and its consistent public utterances since its original *MCI* decision in 1968[3] make it clear beyond any doubt that although FCC intended to and believed it had authorized specialized carriers to provide new and innovative communications services, FCC did not and has not found competition in the offering of plain old long distance telephone service required by or in the public interest. And as recently as 1974, even MCI agreed with FCC. In MCI's own words:

> "Specialized carriers are *not* authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has alleged that they are . . . . They proposed, and have been authorized, to provide the full range of *private line* service. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system" (MCI Motion to Strike, May 15, 1974, in *Washing-*

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[2] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 98 S.Ct. 1197 (1978).

[3] See, *e.g.,* Statement of Chairman Wiley, House Hearings, 94th Cong., 1st Sess., 46 (March 11, 1975); First Report, FCC Docket No. 20003, p. 8 (September 27, 1976). In each instance it was specifically stated that the Commission had not authorized competition in the long distance telephone service market.

ton Utilities & Transportation Commission v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1974)).

Four years ago, then, and three years after the FCC's *Specialized Carrier* decision,[4] both the FCC and MCI understood and agreed on the limited scope of specialized carriers authorizations. A logical question, then, is whether the specialized carriers or the FCC have taken any action since 1974 which would destroy this unanimity of opinion. The short answer is no.

Four FCC decisions are pertinent. First, there is *Bell System Tariff Offerings,*[5] an administrative proceeding which culminated in the much cited *Bell Telephone Company of Pennsylvania* v. *F.C.C.*[6] The *Bell of Pennsylvania* decision, affirming the FCC finding that interconnection for *all private line services* was required, must be read together with the Third Circuit's disposition of the interconnection issue when that issue was initially brought before it by MCI some five months earlier. There the Third Circuit expressly and properly deferred to FCC the determination of "the issue of what private line services have been authorized" and of "the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T."[7] *Bell System Tariff Offerings, supra,* was the FCC's answer to the Third Circuit's questions.

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[4] *Specialized Common Carriers,* 29 F.C.C. 2d 870 (1971); *recon. den.*, 31 F.C.C. 2d 1106 (1971).

[5] 46 F.C.C. 2d 413 (1974).

[6] 503 F.2d 1250 (3d Cir. 1974), *cert. den.*, 422 U.S. 1026 (1975).

[7] *MCI Telecommunications Corp.* v. *AT&T,* 496 F.2d 214, 222 (3d Cir. 1974).

Next are the 1975 and 1976 decisions of the FCC rejecting the MCI Execunet tariffs as beyond the scope of MCI's authorizations.[8] Finally, there is the FCC's February 3, 1978 response to a request for declaratory ruling as to the scope of a telephone company's obligation to offer its local exchanges and its long distance telephone service customers to MCI and other specialized carriers.[9]

The February, 1978 FCC action, wholly consistent with the Commission's series of rulings on specialized carriers since 1968 and responsive to the decisions of the Third Circuit on telephone company interconnection obligations, *supra,* emphasized that FCC had held no hearings on the issue of competition in the provision of ordinary long distance telephone service or on interconnection between telephone companies and specialized carriers for provision of long distance telephone service. Necessarily, then, the FCC could not and it did not make the statutorily required findings that the public interest requires competition in the provision of long distance telephone service, or that it would be in the public interest to require telephone companies to provide their facilities and their customers in furtherance of that competition.

From these events, the conclusion is inescapable that there has been no FCC action since 1974 which even arguably could be construed as authorizing, in the public interest, specialized carrier entry into the long dis-

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[8] *MCI Telecommunications Corp.*, 60 F.C.C. 2d 62 (1975), 60 F.C.C. 2d 25 (1976).

[9] *In the Matter of Petition of AT&T,* Memorandum, Opinion and Order, F.C.C. 78-142, Pet. App. C.

tance telephone service field, or requiring, in the public interest, interconnection by telephone companies of their local exchanges with specialized carriers for that service.

Similarly, there has been no request by MCI (or any other specialized carrier) for authorization to enter the long distance telephone service market or for interconnections to provide that service. What was done, however, was the filing of a vague and ambiguous tariff by MCI, later named "Execunet", which produced the 1975 and 1976 FCC decisions rejecting the tariff as beyond the scope of MCI's authorizations. Thus without FCC authorization or request for authorization, two new long distance telephone companies (MCI and SPCC) have in fact come into being.

III. THE "DECISION OF THE FEDERAL GOVERNMENT" WAS BY THE COURT BELOW.

With FCC not only not affirmatively authorizing competition or requiring interconnection, necessarily the reason for the existence now of competing long distance telephone companies must be found in the decisions of the court below. To begin, the lower court, in its result oriented opinion in *Execunet I*,[10] ingeniously concluded that FCC had erred in believing that it could grant authorizations "as applied for." On the contrary, the court said below, FCC must also establish a record to support an affirmative conclusion that authority not applied for should not be granted.[11]

[10] 561 F.2d 365.

[11] The drastic change from the Commission's standard "as applied for" procedure to this new judicially prescribed regulatory scheme is acknowledged in the Commission's post-*Execunet* orders. (See USITA Petition (No. 78-216), Attachment, p. 2a., note).

When FCC instituted a proceeding to establish that record, and, on the same day twice acknowledged that it had no record on which to base an affirmative finding that long distance telephone service competition and interconnection would be in the public interest, the court below reacted not judicially, but rather emotionally, to what it apparently perceived as an affront to its judicial dignity. In *Execunet II*,[12] the court below concluded that it had not merely remanded a Commission error for correction by the Commission, but that it (the court) had affirmatively commanded entry into the long distance telephone service market by MCI and had affirmatively required telephone company interconnection with MCI and other specialized carriers.

Thus, contrary to the arguments presented to the Court in opposition to the petitions for certiorari in *Execunet I* that all the court below had done was discover a procedural error and remand the case to the FCC for correction of that error,[13] the court below has

[12] Pet. App. A.

[13] See, *e.g.*, SPCC Brief in Opposition, Nos. 77-420 *et al.*, where at pp. 10-11 the argument reads:

> "The ultimate issue remaining for decision by the Commission is one which it has never properly considered and resolved, viz., how much *further* does and should competition in communications services extend. The decision of the Court of Appeals below has not resolved this issue. *It has made no ruling on the lawfulness of Execunet*, or of the AT&T monopoly in MTS services, or on the proper dividing line, if any, which may be drawn between MTS and private line services, or between authorized and non-authorized services. All these matters are left for the Commission to decide. Indeed, the Court of Appeals has expressly noted: (footnote omitted)
>
> > In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings (Emphasis supplied)."

now interpreted its *Execunet I* decision as follows:

> ". . . MCI has met with almost continuous resistance from AT&T in its efforts to provide communications services. *We had thought that this process finally culminated in our Execunet decision upholding MCI's authority to offer Execunet* pending further rulemaking by the Commission." (Emphasis supplied).[14]

In *Execunet II* the court below also concluded that:

> ". . . our analysis and decision of the *Execunet* case is plainly inconsistent with the analysis and ruling of the Commission on February 23, 1978 holding AT&T under 'no obligation' to provide interconnections for Execunet." (*Slip Op.*, p. 12; Pet. App. 11a).

Additionally, in holding that AT&T's interconnection obligations were as expansive as the court-ordered unlimited MCI authorizations, *Execunet II* iterated and reiterated the *Execunet I* direction to the FCC that only by tariff or rulemaking proceedings could the Commission undertake to limit MCI's right to enter the long distance telephone market and compete with AT&T.[15]

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[14] *Slip Op.*, p. 3, Pet. App. 3a. See also the court's comments "Having successfully litigated the question of its right to provide Execunet service . . ." (*Slip Op.*, p. 10, Pet. App. 10a); "For in *Execunet* we held that MCI's facilities authorization encompassed Execunet service . . ." (*Slip Op.*, p .14, Pet. App. 13a); and see also the court's *per curiam* memorandum holding, in effect, that until the Commission has completed its broad rulemaking proceeding and determined whether competition in the long distance telephone service market is or is not in the public interest, it may not take any action that would be inconsistent with the judicially established "MCI's right to enter the market now" (*Execunet III*, Pet. App. 9b).

[15] *Slip Op.*, pp. 14, 15; Pet. App. 13a, 14a.

IV. THE "DECISION OF THE FEDERAL GOVERNMENT" USURPED AGENCY FUNCTIONS.

In reaching the result it desired, the court below not only usurped the FCC's substantive right and responsibility under its statute to determine whether the public interest requires authorizations and carrier interconnections, but the court also without warrant undertook to prescribe the procedures that the agency must follow, an intrusion consistently condemned by the Court.[16] Moreover, in excluding from its own consideration, as well as the Commission's, the interconnection hearing and public interest finding procedure prescribed by the Commission's statute, the court leaves itself without foundation in law for its interconnection order. Inasmuch as there is no common law obligation on the part of a carrier to interconnect its facilities with those of another carrier,[17] the interconnection obligation is purely a matter of statute. Thus the court's nullification of the statute (Communications Act, Sec. 201(a))[18] as a method by which FCC may proceed also eliminates the only basis for the obligation.

In sum, we have in this case court-ordered long distance telephone service competition. We have court-ordered interconnection. And we have both without the semblance of an FCC public interest finding, and indeed in complete opposition to the findings and conclusions reached by the Commission, its reading of its

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[16] See, *e.g.*, *Vermont Yankee, supra; F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

[17] *Atchison, Topeka & S.F.R.R. Co.* v. *Denver N.O.R.R. Co.*, 110 U.S. 667 (1884); *Louisville & Nashville R.R. Co.* v. *West Coast Co.*, 198 U.S. 483 (1904).

[18] 47 U.S.C. 201(a); Pet. App. 1f.

own orders, and its understanding of decisions from other circuits.

Additionally, we have a court-discovered and directed exclusive procedure which it said the FCC should have followed to properly (in the court's view) accomplish what the FCC intended to do and in good faith believed it had done, together with further court-prescribed procedures by which and only by which the Commission may now undertake to rectify its newly court-discovered mistake. Meanwhile, court-ordered authorization and court-ordered interconnection must be permitted to continue and expand.

V. THE BRIEFS IN OPPOSITION AVOID THE ISSUE.

In the face of these clearly unwarranted judicial usurpations of administrative functions by the court below and their effects, what do the MCI and SPCC briefs in opposition have to say on the point?

SPCC devotes but one conclusionary sentence to the Vermont Yankee [19] issue. The court below was not unhappy with the result reached by FCC, says SPCC, but merely sought to achieve the intended effect of the result it decreed.[20] This simply begs the question, for the court's usurpation of administrative functions permeates *Execunet I* as now construed in *Execunet II*.

The MCI brief does devote two pages and six lines to the point, but most of this space is occupied by a lengthy quotation from *Execunet III* and an even

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[19] *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc., supra.*

[20] SPCC Brief in Opposition, pp. 15-16.

longer footnote reference to pending Federal legislation styled "Communications Act of 1978." [21]

The quotation from *Execunet III* does not help MCI or the court below. Rather, it is an excellent illustration of the degree to which judicial usurpation of agency authority took place below. For while the court in *Execunet III* expressed "complete agreement" with USITA's emphasis on *Commission—not court—responsibility* for determining whether competition in long distance telephone service is in the public interest, it cavalierly dismisses the Commission's belief that it must affirmatively find competition (and interconnection) to be in the public interest *before* authorizing competition or ordering interconnection, characterizing the Commission's position as "reflect[ing] only the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*." [22]

That this had been the Commission's consistent interpretation over many years of its statute, its decisions, and the Third Circuit decisions (including the Third Circuit decision deferring to the Commission on the question of the scope of the competition FCC had

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[21] MCI Brief in Opposition, pp. 25-26. MCI's characterization (n.54) of the proposed Sec. 331 of the pending bill as "a ringing declaration that sound public policy requires maximum reliance on competition in telecommunications" is quite helpful, for where the Congress finds new legislation necessary to establish this policy, clearly the existing Communications Act of 1934 does not establish it; and it is under the existing statute and the Court's reading of that statute that the Commission must act.

[22] *Execunet III*, Pet. App. 8b-9b.

authorized)[23] is ignored by the court below in stressing the preeminence and overriding importance of its own *Execunet I* decision. What the court also continued to overlook, however, is the fact that the Commission's interpretation of its statute and its decisions were in complete harmony with the Court's interpretation in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953)—

> "The Act by its terms *prohibits competition by those whose entry* does not satisfy the public interest standard." (Emphasis supplied)

Despite this clear and explicit holding, however, the court below marches to a different beat, one which sounds in the negative, *i.e.*, entry must be allowed now without a public interest finding, and the Commission may require *exit* only when and where it finds competition *not* in the public interest.

CONCLUSION

As demonstrated herein, in USITA's petition in No. 78-216, in the AT&T petition in No. 78-217, and in the F.C.C. petition in No. 78-270, the court below has clearly and drastically exceeded the bounds of judicial review, usurped the functions of the F.C.C., and by mandating continued and expanded interconnected competition in long distance telephone service "until it [is] found that the public interest demand[s] otherwise,"[24] the court below has removed any doubt that may have existed that its decisions are ripe for review on certiorari.

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[23] *MCI* v. *AT&T*, *supra*.

[24] *Execunet II*, Slip Op., p. 15, Pet. App. 14a.

The petitions should be granted.

Respectfully submitted,

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SUPPLEMENTAL REPLY OF PETITIONER

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SUPPLEMENTAL REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), petitioner in No. 78-216, hereby respectfully submits this brief reply to the "Brief in Opposition" filed by the Solicitor General of the United States and the Assistant Attorney General, Antitrust Division, U.S. Department of Justice.

In succinct summary, it appears to be the Antitrust Division's position that since in its view the court below reached the right result (*i.e.*, the court authorized new long distance telephone companies and required existing telephone companies to assist the new com-

petitors), whether the court below overstepped the bounds of judicial review, usurped agency functions, erred in construing statutes, or created conflict between circuits are matters of little moment and in any event do not warrant the attention of the Court.

The central point here, however, is not whether the Antitrust Division agrees with the result reached by the court below—and since that Division had unsuccessfully urged its views on the FCC in these matters before the Commission, its agreement with the decisions of the court below and its effort to shield those decisions from review and possible reversal come as no great surprise—but rather whether common carrier communications policy, common carrier communications authorizations, common carrier interconnection obligations, and common carrier regulatory procedures are to be determined by the administrative agency charged by the Congress with statutory responsibility for those determinations, or by the court below through judicial veto of Commission decisions.

Curiously, this central point is ignored in the document styled "Brief for the United States in Opposition." Rather than addressing the issue, the brief in opposition contents itself with the thrice repeated myopic assertions that ". . . we do not see how . . . ," "we see no reason why . . . ," and "[n]or do we see . . ."[1] any significant impact on the Commission's responsibility, on its pending proceedings, or on administrative or communications law.

With all due deference, it appears that the reason for these visual difficulties is a failure to look at the

[1] Brief in Opposition, p. 14.

real world results of the decisions below. Had the United States looked, it would have been compelled to concede that:

1. New long distance telephone companies are in operation *because the court below, not the Commission, authorized them;*
2. Existing telephone companies are now required to interconnect their facilities with the new companies *because the court below, not the Commission, ordered these interconnections;*
3. The deliberations and the decisions of the Third Circuit and the Commission[2] on the scope of telephone company interconnection obligations have been rendered meaningless, for *by order of the court below interconnection obligations are unlimited;*
4. The Commission has been required *by order of the court below, and without an affirmative public interest finding,* either administrative or judicial, to permit continued and expanded long distance telephone service competition for the duration of a proceeding having as its purpose whether that finding can be made.

The judicial activism exemplified by these facts is aptly described in the concluding sentence of the Brief in Opposition:

> ". . . *the decision below is based,* in the last analysis, *on the court of appeals determination of what the Commission in fact decided. . .*"[3] (Emphasis supplied).

[2] *MCI Telecommunications Corp.* v. *F.C.C.*, 496 F.2d 214, (3d Cir. 1974); *Bell System Tariff Offerings*, 46 F.C.C. 2d 413 (1974); *Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *cert. den.* 422 U.S. 1026 (1975).

[3] Brief in Opposition, p. 14.

This is precisely the problem, for if one thing in these cases is unmistakably clear for all to see, the court of appeals determination of what the Commission decided is totally at odds on all counts with the Commission's decisions. The Commission decided that specialized carriers were not authorized to provide long distance telephone service. The court below found that they were. The Commission decided that the interconnection obligations of existing telephone companies were limited to private line services. The court below found these obligations unlimited.

Moreover, even if it be assumed, *arguendo,* that the Commission erred in its belief that its statute "prohibits competition by those whose entry does not satisfy the public interest standard,"[4] *i.e.,* that the Commission must first affirmatively find a public interest requirement *before authorizing entry,* the finding of that administrative error by the court below marked the bounds of judicial review.[5]

In short, it was for the Commission, not the court below, to determine whether competition in long distance telephone service satisfies the public interest standard. It was for the Commission, not the court below, to determine whether facility interconnection was necessary or desirable in the public interest. And it was for the Commission, not the court below, to decide how "it may best proceed to develop the needed evidence and how its prior decision should be modified in light

[4] *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953).

[5] See, *e.g.*, *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

of such evidence as develops."[6] But as the record here shows, none of these functions was left for the Commission to perform; all were usurped by the court below.

Thus has the error by the court below in its *Execunet I* decision[7] now been grievously compounded by the decision in *Execunet II.*[8] Given the circumstances, the fact that the United States agreed with the Commission that *Execunet I* did warrant review but the Antitrust Division now concludes that the decisions of the court below do not warrant review is a conclusion that defies logical or rational explanation.

As noted, however, it does appear that the Antitrust Division now finds the decisions below in accord with its philosophy of competition. We respectfully suggest that the Division's philosophy is entitled to little, if any, weight here, for the task of regulating communication common carriers has been assigned to the Commission, not the Division.

Moreover, it cannot be seriously argued that in the decisions below the court has observed the limits of judicial review.[9] Rather, undisputably evident is the fact that the court below has far overstepped the bounds, and has itself decided and ordered immediate

[6] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 98 S.Ct. 1197 (1978).

[7] *MCI Telecommunications Corp.* v. *F.C.C.*, 561 F.2d 365 (D.C. Cir. 1977), *cert. den.* 434 U.S. 1040 (1978).

[8] Pet. App. D.

[9] See, *e.g.*, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 Cornell Law Review 375, 396 (1974).

implementation of its own version of Federal communications policy and communications authorizations and requirements. These errors are of more than sufficient importance to warrant review by the Court.

For these reasons, together with the reasons stated in USITA's petition and in its reply to earlier filed oppositions, certiorari should be granted..

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